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In The

Supreme Court of the United States

October Term, 1998

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,

Petitioner,

v.

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issues presented by this appeal are as follows:

1. Whether a court may eschew and override agreed-upon provisions in collective bargaining agreements ("CBAs") prohibiting oral or implied modifications of any kind whatsoever by ruling that the CBAs could nevertheless be orally modified; and

2. Whether courts and the National Labor Relations Board ("the Board") have concurrent jurisdiction over a defense – that a side agreement to modify a CBA is illegal and void for violating notice requirements of section 8(d) of the National Labor Relations Act ("NLRA") – where the underlying action has been brought in state court rather than before the Board.

PARTIES

The Parties to this proceeding are those named in the Caption of this case. There exist no other parent companies or nonwholly owned subsidiaries related to this action.

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PETITION FOR A WRIT OF CERTIORARI

The Plumbing-Heating-Cooling Contractors Association of the Greater Bay Area, Inc. (named herein as Greater Bay Area Association of Plumbing and Mechanical Contractors and hereinafter "GBA" or "Petitioner") hereby respectfully petitions this Court for a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, Division Five in this case.

OPINIONS AND ORDERS BELOW

The Order of the California Supreme Court is unpublished and reprinted in full at Appendix B ("App. B").

The decision of the California Court of Appeal, First Appellate District, Division Five is partially published at 66 Cal. App. 4th 672 (1998) and reprinted in full at Appendix A ("App. A").

The order of the Trial Court, granting Petitioner's Motion in Limine (essentially dismissing the case) is unreported. It is reprinted here in full at Appendix C ("App. C").

JURISDICTION

The California Court of Appeal, First Appellate District, Division Five issued its decision in this case on September 8, 1998. App. A. Review of this decision was

denied by the California Supreme Court on December 16, 1998. App. B.

This Court has jurisdiction to review this case under 28 U.S.C. § 1257. This petition has been filed within the time limits set forth in Supreme Court Rule 13(i).

STATUTORY PROVISIONS INVOLVED

The statutory provision involved is section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1998). The text of this section appears at Appendix D ("App. D").

STATEMENT OF THE CASE

The facts underlying this petition are, briefly, as follows: Mechanical Contractors Association of Northern California ("Respondent" or "MCA") and Petitioner GBA are both associations composed of various employers; both associations enter into collective bargaining agreements with various unions on behalf of their respective members. (Compl., at ¶¶ 1, 2, 4, 5 at CT 1-2, App. 39-41.)[1]

[1] GBA refers herein to the Clerk's Transcript as "CT ___"; and the Reporter's Transcript as "RT ___." The Clerk's Transcript is set forth in Appendix E ("App. E"). The Reporter's Transcript is set forth in Appendix F ("App. F").

All of the relevant facts underlying this petition are undisputed. The undisputed facts in this action are set forth in two documents contained in the Clerk's Transcript. The first is GBA's "Separate Statement in Opposition to Plaintiff's Motion of Summary Adjudication," which will hereinafter be referred

The governing CBAs in this case explicitly prohibit their terms from being changed in any manner whatsoever except in a writing signed by the union and the affected association. (Compl., ¶ 10 at CT 4, App. 42; DUMF 11 at CT 149, App. 226-28; PUMF 3 at CT 157-158, App. 235-37.) Except for the present dispute, the parties have always honored their respective no-oral modification provisions. (RT 25:1-21, App. 350.)

In 1994, MCA proposed and GBA and MCA agreed, without Union participation, to enter into a side agreement (the "Association Side Agreement") regarding contractors changing associations during midterm of the CBAs. (CT 11-12, App. 49-51.) Under the Association Side Agreement, both associations agreed that their members could switch associations by giving written notice to both associations and that contract administration funds from those contractors which were earned after the effective date of the association change would be paid to the contractor's new association. (CT 11-12, App. 49-51; *see also* DUMF 10, at CT 148, App. 225-26.)[2]

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to as "DUMF___" and which is included in CT 145-154, App. 222-33. The second document is MCA's "Separate Statement [of Undisputed Facts] In Opposition to Defendant's Cross-Motion for Summary Judgment or Summary Adjudication of Issues," which will hereinafter be referred to as "PUMF ___" and which appears at CT 156-163, App. 234-43. Plaintiff's Complaint is referred to herein as "Compl." and appears at CT 1-16, App. 39-54.

[2] MCA and GBA are not parties to the same collective bargaining agreements. Rather, MCA and GBA have separately agreed to two written collective bargaining agreements (the "CBAs") with two local unions, Local Union 393 (in Santa Clara County, California) and Local Union 467 (in San Mateo County,

This Association Side Agreement, if agreed to by the Unions in writing, undisputedly would have modified the CBAs; however, the unions subsequently failed to agree in writing to the modifications wrought by the Association Side Agreement. (DUMF 10-11 at CT 148-149, App. 225-28.) The California Court of Appeal concluded that "MCA obtained the unions' oral, but not written, consent to the [Association Side Agreement]." (App. A at App. 10-11.) Moreover, no notice was given to any state or federal mediation agency as required by the National Labor Relations Act concerning the negotiation of this purported modification of the CBA's. (PUMF 8, at CT 159, App. 237-38.)

In 1995, MCA attempted to enforce the 1994 oral modification to the CBAs, when two GBA contractors – during the midterm of the CBAs – attempted to switch to MCA and to terminate their obligations under Petitioner's CBAs. This transfer was permissible only if the Association Side Agreement was validly adopted by the Unions. MCA then demanded that contract administration funds for those contractors be paid to MCA rather than GBA. Because the CBAs required the Unions to

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California). (CT 2, App. 40-41.) These CBAs are "Master" labor agreements, that is they are negotiated and applied to all signatory employers in the respective union's geographical jurisdiction. Significantly, a contractor signatory to the CBAs of GBA is not bound by, or a signatory to, the CBAs of MCA. Contractors may not terminate their obligations under the CBAs, including their obligation to pay contract administration funds to their association, except by giving notice in accordance with the CBAs within the period of ninety (90) and sixty (60) days before they expire. Contract administration funds are essentially dues that contractors pay to their association under the CBAs.

agree in writing to all modifications of its terms and they had not done so, GBA protested that the Association Side Agreement was unenforceable. (PUMF 13-14, at CT 161, App. 239-40; RT 22:3-23:8, App. 347-49.)

MCA brought a breach of contract action, to enforce the Association Side Agreement, (CT 1-9, App. 39-48), and the trial court entered judgment for GBA because the Association Side Agreement was unenforceable as a matter of law. (CT 218, App. 315-16.)[3] The Court of Appeal reversed the trial court and remanded the case for further proceedings not pertinent to the issues raised in this Petition. (App. A.) The California Supreme Court denied review. (App. B.)

The Petition addresses two distinct aspects of the Court of Appeal's decision which should be reviewed by this Court. The first issue, as stated by the Court of Appeal, is "Can a collective bargaining agreement be modified orally when it specifies that it may only be modified in writing?" (App. A at App. 10.) The second issue is whether the NLRA preempts GBA from asserting a defense that the Association Side Agreement is unenforceable because it was not made in accordance with section 8(d) of the NLRA.

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[3] The trial court, under *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15, 26-27 (Cal. Ct. App. 1997), effectively dismissed MCA's claim by granting GBA's motion *in limine* to exclude all of MCA's evidence because it found that the underlying Association Side Agreement was not valid and enforceable as a matter of law.

I. REASONS FOR GRANTING THE WRIT

A. This Court Should Address the Issue Of Whether It Is Legally Valid To Have An Oral Modification Of A Collective Bargaining Agreement Which Expressly Provides For Written Modification Only.

The first issue presents important questions of federal labor law that have fragmented federal Courts of Appeals and have never been addressed by this Court. Lower courts need guidance in this confused but critical area of federal labor law.[4] Additionally, judicially disregarding agreed-upon and lawful provisions in CBAs is not consistent with federal labor law policies. Allowing courts to jettison provisions in CBAs which ban oral or implied modification, as the California Court of Appeal below did, would destroy the Union-Employer bargaining process by denying certainty to those parties who mutually value confining their obligations to the "four corners" of a document. At its core, the California Court of Appeal's decision is contrary to the fundamental federal labor law principle that the substance of CBAs is left for the parties to determine. Now that a California Court of Appeal has given its unconditional imprimatur to overturning national labor policy, the need for review is heightened, especially as this case presents a rare and

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[4] According to the AFL-CIO, 14.1 percent of all employees in the United States work under collective bargaining agreements. *See* AFL-CIO website at *http://www.aflcio.org/uniondifference/uniondiff16.htm, citing* Bureau of National Affairs, *Union Membership and Earnings Data Book* (1998).

straightforward opportunity to review this important area of the law.

1. The Federal Courts Of Appeal Have Proven Incapable Of Achieving Consistency On This Critical Area Of The Law.

Over the six-plus decades since the NLRA debuted in 1935, only two federal appellate courts before the present case have considered whether no-oral modification provisions in collective bargaining agreements may be disregarded. Beginning with *Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996*, 597 F.2d 1269 (9th Cir. 1979), a Ninth Circuit panel answered this question "yes." The Ninth Circuit vitiated the bargained-for provision against oral changes by assuming, without any support, that it knew better than the parties who had negotiated the collective bargaining agreement how to encourage a stable and peaceful industrial relationship.

In the last appellate court decision before the present case, a divided panel of the federal Court of Appeal for the District of Columbia addressed the same question that had been at issue in *Hawaii Teamsters* but rejected the Ninth Circuit's outdated and paternalistic reasoning. *See Martinsville Nylon Employees v. N.L.R.B.*, 969 F.2d 1263 (D.C. Cir. 1992).

Rather than make a raw policy decision, as the Ninth Circuit had done over two decades earlier, the D.C. Circuit analyzed federal labor law and comparable state legislation drawing from the modern approach illustrated by the Uniform Commercial Code, which has been enacted in every state. The D.C. Circuit emphasized that

the Uniform Commercial Code's "no oral modification" rule best serves all parties to a contract because it "enables those parties who mutually value certainty in their relations to have it."[5] *Martinsville*, 969 F.2d at 1267.

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[5] *Martinsville* points out that "[i]n modern times the common law rule [permitting oral modifications despite no-oral modification language] has been discarded in broad areas. Most significantly, the Uniform Commercial Code, *as enacted in every state*, provides with respect to contracts for the sale of goods:

> 'A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.'

§ 2-209(2); *cf.* UCC § 2-208(1) ("course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement"). *See also Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1284-85 (7th Cir. 1986) (Wisconsin UCC); *South Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108, 1117 (5th Cir. 1984) ("no-oral-modification clauses are binding in Texas" under UCC); *Elmsford Sheet Metal Workers, Inc. v. Shasta Indus.*, 477 N.Y.S. 2d 391, 392 (N.Y. App. Div. 1984) (same in New York); *cf. Martens v. General Foods Corp.*, 96 N.Y.S. 2d 329, 329-30 (N.Y. App. Div. 1950) (same in pre-UCC sale of goods case). In other contexts, the old rule has been limited but not discarded altogether. *See* N.Y. Gen. Oblig. L. § 15-301(1) ("written agreement . . . which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed"); Cal. Civ. Code § 1698 (same). Even where the common law rule persists, there are other exceptions. In some states, if a contract, as modified, would fall within the scope of the Statute of Frauds, then the modification must be in writing. *See, e.g., Mar-Lan Indus. v. Nelson*, 635 S.W.2d 853, 855 (Tex. Ct. App. 1982)." *Martinsville*, 969 F.2d at 1267 (emphasis added).

In fact, "all potential parties to a CBA are better off under the UCC rule, which gives them the flexibility to specify as they see fit how their agreement may be modified." *Id.* at 1267-68.[6] Flexibility entails giving labor and management the *option* of having fully integrated agreements and of banning oral side agreements. And the D.C. Circuit understood that overriding a provision against oral modifications would expose the parties to the class of claims (*e.g.*, oral and implied agreements) – which even when asserted in good faith – would be most likely to breed litigation and would disturb the kind of comforting certainty that comes from knowing that your relationship is spelled out in the "four corners" of a written contract.[7] By contrast, under *Hawaii Teamsters*, it would be impossible for negotiators to know in bargaining or administering the CBAs which provisions can be, or cannot be, orally modified notwithstanding a prohibition against *all* oral

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[6] In *Martinsville*, the D.C. Circuit also emphasized that collective bargaining agreements, like commercial contracts, are between sophisticated parties, usually represented by specialized counsel.

[7] The measure of certainty offered by written agreements is critical in this area because "collective bargaining agreements have evolved from simple documents, specifying only a union or closed shop, a wage scale and hours of work, but without a grievance procedure or protections against discharge and without provisions governing such matters as seniority, transfers, promotions, and job classifications, to much more complex instruments which are, in effect, basic legislation governing the lives of workers." *See* David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 719 (1973), *citing* Archibald Cox, *Rights Under A Labor Agreement*, 69 HARV. L. REV. 601 (1956) and Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958).

modifications. They would face the prospect of having to wait for a court or arbitrator to tell them, perhaps years or decades later, that their CBAs were modified by an oral side agreement.

The California Court of Appeal here independently considered, because of the conflict in the federal Courts of Appeals and the absence of California or U.S. Supreme Court authorities, the conflicting Ninth and D.C. Circuit cases. *See Alicia T. v. Los Angeles*, 222 Cal. App. 3d 869, 879 (Cal. Ct. App. 1990).[8] As discussed above, the California Court of Appeal adopted *Hawaii Teamsters'* view. *Hawaii Teamsters* and the California Court of Appeals scrapped the provision against oral modifications on the naked assumption that such judicial activism was needed to prevent an undue risk of industrial strife. The California Court of Appeal took away from the unions and the associations and their contractors the benefit of their bargain without a scintilla of support in the record below. Moreover, the California Court of Appeal ignored that the parties have regularly modified their CBAs during their midterm and have always done so in writing before and after the Association Side Agreement. (RT 25:1-21, App. 350.)

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[8] Indeed, the Supreme Court recently mentioned, but did not address, the related issue of the impact of a "zipper clause" on a federal government employer's statutory duty to bargain during the term of the contract. *See National Fed'n of Fed. Employees v. Department of the Interior*, ___ U.S. ___, 1999 WL 104407, at *2 (1999).

2. The Decision Below Introduces A Fundamental Change In Federal Labor Policy.

The idea that the parties' relative strength determines the outcome in collective bargaining and that those outcomes will be enforced is pervasive in federal labor law. With the exception of certain provisions which are made illegal by statute, the premise that federal law does not generally regulate the content of collective bargaining agreements has been constant. *See, e.g., N.L.R.B. v. Insurance Agents*, 361 U.S. 477, 488-89 (1960) (referring to collective bargaining as *"a system where the Government does not attempt to control the results of negotiations"* and where "necessity for good-faith bargaining between the parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms . . . ") (emphasis added); *N.L.R.B. v. American Nat'l Ins. Co.*, 343 U.S. 395, 402-04 (1952) (section 8(d) of the NLRA was enacted to preclude the courts or the Board from passing upon the *content* of proposals and counterproposals made by the parties to bargaining).[9]

Hawaii Teamsters and the California Court of Appeal's views, at their core, are based on the disturbing, paternalistic assumption that substantive terms, including those prohibiting oral changes, may be judicially jettisoned where courts decide to make a raw, unconcealed

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[9] Specifically, the Court in *American National Insurance Co.* stated that "the Act does not compel any agreement whatsoever between employees and employers. *Nor does the Act regulate the substantive terms* governing wages, hours and working conditions that are incorporated in an agreement." *Id.* (emphasis added).

policy choice that they – rather than the parties – know how to encourage industrial peace. Simply put, the unprecedented effect of *Hawaii Teamsters* and the California Court of Appeal's assumption is that courts may undo what the parties have fought for and obtained in collective bargaining – something they clearly cannot do under the United States Supreme Court decisions cited above.

Additionally, the ability of parties to prohibit oral or implied modifications is critical in this area of the law. During the midterm of a collective bargaining agreement, a party, upon request, must bargain over issues regarding terms and conditions of employment which are not covered in the collective bargaining agreement. *See* NLRA § 8(d), 29 U.S.C. § 158(d); *N.L.R.B. v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952). Because mid-term bargaining and modifications are common, it is even more critical in this area of the law that experienced parties be able to decide how their agreements can be validly modified. *See, e.g., Insurance Agents*, 361 U.S. at 488-89; *America Nat'l Ins. Co.*, 343 U.S. at 402-04; *Martinsville*, 969 F.2d 1263.

3. This Court Should Review The Judgment Of The Court Below Because It Offers A Rare Clear Opportunity To Review This Vital Issue.

If the Court does not review the judgment of the California Court of Appeal, it may be years before this Court has another opportunity as clearly presented. The facts in this case are straightforward and ideally focus the issue for judicial review.

B. This Court Should Address The Issue Of Whether Courts Have Concurrent Jurisdiction With The Board Over Defenses To Enforcement Of Collective Bargaining Agreements.

This Court should also review the California Court of Appeal's ruling that GBA's defense based on noncompliance with the notice requirements of federal labor law is preempted. The issue presents a special and important question involving the rights of labor and management that should be settled by this Court. (CT 123-124, 203-204, App. 192-95, 296-99.) There is now considerable uncertainty about whether state and federal courts have concurrent jurisdiction with the Board when a defense is asserted based on noncompliance with section 8(d) of the National Labor Relations Act. In large measure this uncertainty has been caused by the California Court of Appeal disregarding the decisions of the United States Supreme Court and allowing MCA to enforce a purported modification of a collective bargaining agreement while ignoring valid defenses over MCA's noncompliance with notice requirements of federal labor statutes on the theory that concurrent jurisdiction exists for enforcement, but not for defenses to enforcement. The Court should review this issue to ensure that courts faithfully follow United States Supreme Court precedent and to provide necessary guidance on this critical but now uncertain area.

The California Court of Appeal here took an unlikely path to reject GBA's defense that the 1994 Agreement was illegal and, thus, unenforceable, noting in its decision: "[t]he NLRB has exclusive jurisdiction to adjudicate disputes involving alleged unfair labor practices." (App. A at App. 23.)

Factually, there has been no dispute that the Association Side Agreement did not comply with Section 8(d). The California Court of Appeal wrote that "it is undisputed that MCA did not furnish the unions or the appropriate state and federal agencies with written notice pursuant to Section 8(d) before MCA and GBA executed the Contract." (App. A at App. 21.) The court went on to note that "an employer's failure to provide the notice required under Section 8(d) before modifying or terminating a collective bargaining agreement has been held to be an unfair labor practice." *Id.* (citations omitted). Finally, quoting from its decision in *Green v. Mount Diablo Hospital District*, 207 Cal. App. 3d 63, 73 (Cal. Ct. App. 1989), the court acknowledged that "[c]ontracts that are contrary to express statutes or to the policy of express statutes . . . are illegal contracts. Any such illegality *voids the entire contract*." *Id.* at 15 (citations omitted) (emphasis added).

After making these several observations in favor of GBA's position, the court declined to rule on the merits of GBA's section 8(d) defense, claiming instead that the Board's exclusive jurisdiction over disputes involving unfair labor practices prevented it from doing so.

The California Court of Appeal's reasoning sets up an utterly irrational distinction: defensively asserting a violation of federal labor law in a civil action to enforce a modification of a collective bargaining agreement is preempted, but plaintiff's underlying claim is not. GBA has not, as the California Court of Appeal suggested, asked it to exceed its jurisdiction and find and remedy an unfair labor practice by MCA. GBA has not brought an unfair labor practice charge before the court, and it does not

seek affirmative remedies for a violation. Instead, GBA has asserted the section 8(d) violation *defensively*, in response to MCA's civil contract action.

The California Court of Appeal reasoning sharply conflicts with United States Supreme Court precedent. Indeed, for nearly two decades it has been well settled that offensive use of the NLRA outside the auspices of the Board is preempted, *while defensive use of the NLRA is not. See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). *Kaiser* amplifies this distinction as follows:

> where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court *must* entertain the defense. While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e) [of the NLRA].

Id.[10] Were preemption to apply as the California Court of Appeal has ruled, "parties could be compelled to comply with the contract clauses, the lawfulness of which would be insulated from review by any court." *Id.*[11]

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[10] The fact that *Kaiser* involved a violation of section 8(e) while the case at bar involves a section 8(d) violation is of no moment. The relevant question is whether the Association Side Agreement violated federal labor law, not whether it violated a particular section.

[11] As a corollary, while defenses aimed at a particular provision of a collective bargaining agreement are not preempted, defenses attacking the legality of an *entire* collective bargaining agreement may be preempted. *See Glaziers and Glassworkers Local Union No. 767 v. Custom Auto Glass Distribs.*, 689 F.2d 1339, 1343-44 (9th Cir. 1982) (the employers' challenge

Because GBA raised section 8(d) only in connection with its defense of illegality directed at the Association Side Agreement, the Court of Appeal had jurisdiction and the obligation to consider it. The California Court of Appeal's flawed reasoning, if accepted, would encourage forum shopping, with parties eschewing Board proceedings for court actions, in which otherwise valid NLRA violations could not be successfully raised as a defense. Additionally, the California Court of Appeal's decision would inject intolerable circularity into this important area of the law. Indeed, preemption is a double-edged sword: a court that takes jurisdiction over an action for breach of a CBA must take on the obligation of considering *all* proper defenses to the claim. If the courts were unable to consider an otherwise valid defense due to preemption, then the claim itself would be preempted because its resolution would require consideration of all valid defenses. However, Congress and the courts have long recognized the concurrent jurisdiction of the Board and the courts in interpreting and enforcing collective bargaining agreements.[12]

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to the entire collective bargaining agreement because the union lacked majority status was preempted); *Milk Drivers and Dairy Employees Union, Teamsters Local 302 v. Vevoda*, 772 F.2d 530 (9th Cir. 1985) (a claim that the entire collective bargaining agreement was illegal on the basis of fraudulent inducement was preempted). Here, GBA raised section 8(d) as a defense only to particular provisions (*i.e.*, those dealing with contract administration funds) and not to the entire CBAs.

[12] For example, section 301(a) of the Labor Management Relation Act, 29 U.S.C. § 185(a), confers federal jurisdiction over lawsuits for violation of collective bargaining agreements. State courts have concurrent jurisdiction over such disputes. *See*

In short, review is crucial here to ensure that state and federal courts exercising concurrent jurisdiction over actions to enforce CBAs are mindful of all legitimate defenses to these claims, including defenses asserting that a contract violates federal labor laws.[13]

II. CONCLUSION

Petitioner respectfully submits that based on considerations addressed herein the Petition should be granted.

Respectfully submitted,
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Carpenters Health & Welfare Trust Fund v. Acme Indus., Inc., 224 Cal. App. 3d 187 (Cal. Ct. App. 1990) (citing *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962)).

[13] Were the Court to find that no concurrent jurisdiction existed, and the Board had exclusive jurisdiction over the section 8(d) defense, then the Court would have to remand the case to the California Court of Appeal with instructions to dismiss the case due to the failure to file a charge with the Board within the six (6) month statute of limitations set forth in section 10(b) of the NLRA. *Cf. National Fed'n of Fed. Employees*, 1999 WL 104407 (remanding midterm bargaining issue to federal public sector equivalent of the Board to resolve).

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[p. 1] **APPENDIX A**

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA,	**A078491**
Plaintiff and Appellant,	**San Mateo County (Super. Ct. No. 394184)**
v.	
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,	**(Filed SEP. 8, 1998)**
Defendant and Respondent.	

This is an action for breach of contract and declaratory relief brought by appellant Mechanical Contractors Association of Northern California (hereafter MCA) against respondent Greater Bay Area Association of Plumbing and Mechanical Contractors (hereafter GBA). Both parties are associations of licensed mechanical and plumbing contractors which act as collective bargaining agents on behalf of their members. At the outset of the trial below, the trial court granted GBA's motion *in limine*

*Pursuant to rules 976 and 976.1, California Rules of Court, this opinion is certified for publication, with the exception of parts III. and IV.

to exclude all of MCA's evidence, in effect granting a nonsuit for GBA. In accordance with the parties' stipulation, the trial court thereafter entered judgment in favor of GBA and against MCA.

The ultimate issue on appeal is whether a contract based on a January, 1994 letter between the parties is invalid or void as a matter of law. GBA contends the contract is invalid as a matter of law because it purports to modify certain collective bargaining [p. 2] agreements (hereafter Agreements) between MCA, GBA, and two labor unions, but without the unions' written consent thereto, as required by the Agreements. GBA also contends the contract is void because MCA failed to comply with federal statutory notice requirements for modifications to collective bargaining agreements. Finally, GBA contends that even if the contract was initially valid, it was superseded when the Agreements subsequently were extended without incorporating the contract therein. MCA opposes all these contentions on their merits.

We conclude the contract between MCA and GBA is not invalid or void as a matter of law for the reasons asserted by GBA, and that the trial court therefore erred by granting GBA's motion *in limine*. We reverse the trial court's judgment and remand this matter to the trial court for further proceedings.

STANDARD OF REVIEW

In reviewing the propriety of the order granting GBA's motion *in limine*, we will apply the standard of review applicable to an order granting a nonsuit.

As was well stated recently by Division Three of this court: "In contrast to the usual motion *in limine*, which seeks to keep particular items of evidence from a jury, an 'objection to all evidence' is essentially the same as a general demurrer or motion for judgment on the pleadings seeking to end the trial without the introduction of evidence. Such an objection is properly sustained where even if the plaintiff's allegations were proven, they would not establish a cause of action. [Citations.]" (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 26 (*Edwards*).) Where, as here, the trial court grants a motion at the beginning of trial to exclude all evidence produced during discovery, the motion "may [also] be viewed as the functional equivalent of an order sustaining a demurrer to the evidence, or nonsuit." (*Id.* at p. 27.)

"In either case, the scope of the trial court's inquiry was relatively narrow. Both a demurrer and a motion for judgment on the pleadings accept as true all material factual allegations of the challenged pleading, unless contrary to law or to facts of which a court [p. 3] may take judicial notice. The sole issue is whether the complaint, as it stands, states a cause of action as a matter of law. [Citations.] The scope of a trial court's inquiry on a motion for nonsuit is similarly limited. A motion for nonsuit or demurrer to the evidence concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case. A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference which may be drawn from the evidence, it determines there is *no* substantial evidence to support a judgment in

the plaintiff's favor. [Citations.]" (*Edwards, supra,* 53 Cal.App.4th at pp. 27-28, italics in original.)

In *Edwards,* the court concluded on the record there presented that the trial court's grant of the respondent's motions *in limine* "was tantamount to a nonsuit." (*Edwards, supra,* 53 Cal.App.4th at p. 28.) Since the record in this case supports the same conclusion, we shall treat the trial court's order granting GBA's motion *in limine* to exclude all evidence as a nonsuit. "Therefore, on this appeal we must view the evidence most favorably to [MCA], resolving all presumptions, inferences and doubts in [its] favor, and uphold the judgment for [GBA] only if it was required as a matter of law." (*Ibid.*)

We reject GBA's assertion that we must imply factual findings in favor of the trial court's judgment because MCA did not request a statement of decision pursuant to Code of Civil Procedure section 632. As MCA argues, the express language of section 632 requires a trial court to issue a statement of decision only after a "trial of a question of fact by the court." (Code Civ. Proc., § 632.) No such trial occurred in this case. Rather, the trial court only granted GBA's motion *in limine* to exclude all evidence. The general rule is that a trial court need not issue a statement of decision after a ruling on a motion. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294.) In fact, in ruling on GBA's motion, the trial court was bound to view all factual allegations in the light most favorable to MCA. (*Edwards, supra,* 53 Cal.App.4th at p. 27.) We must not only do the same, but must also resolve all presumptions, inferences, and doubts in MCA's favor. (*Id.* at pp. 27-28.)

[p. 4] FACTUAL BACKGROUND

MCA and GBA are associations of mechanical and plumbing contractors. Each negotiates and enters into collective bargaining agreements with labor unions on behalf of its member contractors. As multi-employer associations, MCA and GBA are parties to separate collective bargaining agreements with the labor unions whose members work for the contractors. Pertinent to this appeal, these collective bargaining agreements generally provide for the payment of "contract administration and industry funds" (hereafter Funds) by association members to their respective associations.[1]

In 1993, MCA and GBA had several disputes over whether individual members could switch their membership from one association to another while a particular collective bargaining agreement was still in effect. At issue was how to allocate Funds to the associations when a switch occurred. The parties met in December 1993 in an effort to resolve their differences, at which time Scott Strawbridge, then executive vice-president of MCA, informed GBA that MCA would shortly be presenting a written proposal for GBA's consideration.

On January 7, 1994, Strawbridge sent a letter outlining MCA's proposal to Ron Peterson, then president of GBA. Among other things, MCA proposed that the parties agree that an individual member could switch

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[1] These Funds are defined as "monies earned by the respective associations for all work performed by union members under the collective bargaining agreements to which that association is signatory."

associations simply by giving written notice to both associations and that Funds earned after the effective date of the switch would be paid to the member's new association. Strawbridge included with his letter a check for $5,000 as payment in exchange for GBA's assignment to MCA of GBA's right to collect that sum from another organization known as "CPMCA."[2] Strawbridge stated [p. 5] that if GBA found the proposal acceptable, then Peterson should obtain authority from GBA's board of directors to initial the letter to signify GBA's acceptance, at which time GBA could cash the check. If GBA found the proposal unacceptable, then GBA was to return the check to MCA.

Prior to making this proposal to GBA, Strawbridge had contacted the business managers of the two unions whose Agreements would be affected if MCA and GBA agreed on the proposal, U.A. Local 467 and U.A. Local 393. Strawbridge contacted the unions because he knew that modification of any provision in the Agreements required the consent of the unions who were signatory to those Agreements. The unions indicated they would comply with whatever procedure MCA and GBA developed with respect to allowing their members to switch associations. Neither union gave its consent in writing, however.

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[2] CPMCA is the California Plumbing and Mechanical Contractors Association. Both MCA and GBA had joined CPMCA prior to their 1993 disputes. CPMCA members were required to contribute $5,000 as "seed money" upon joining the organization. GBA had contributed its share of "seed money" to CPMCA, but MCA had not. When GBA subsequently withdrew from CPMCA, the organization was unable immediately to refund GBA's $5,000.

At a meeting on January 11, 1994, GBA's board of directors agreed to accept MCA's $5,000 check. The minutes of the meeting stated in conjunction with that action that "[i]f anyone wishes to change associations they can change on the anniversary date of each year." On January 20, 1994, Peterson initialed Strawbridge's January 7 letter and returned in to MCA. GBA also sent MCA a separate letter confirming its acceptance of the $5,000 check, and thereafter cashed the check and deposited it in its bank account.

In reliance on the MCA-GBA contract (hereafter the Contract), MCA took such steps as transferring certain Funds to GBA when GBA claimed to have provided services for a contractor that had switched its membership to MCA, and allowing one if its members to switch to GBA. MCA would not have allowed the switch but for the Contract.

[p. 6] The trouble in this case began in 1995 when two members of GBA attempted to switch their affiliation to MCA. GBA refused to recognize the switch on the grounds the Contract was not binding and GBA had not agreed to the switch. Funds that would have been paid to MCA for these members continue to be paid to GBA.

PROCEDURAL BACKGROUND

On October 24, 1995, MCA filed suit against GBA for breach of contract and for a declaratory judgment that the

Contract was a binding and enforceable contract.[3] The parties thereafter filed cross-motions for summary adjudication, which the trial court denied on January 7, 1997, on the ground neither party had carried its initial burden of proof under Code of Civil Procedure section 437c.

On March 17, 1997, the first day of trial, GBA filed a motion *in limine* asking the trial court to exclude all of MCA's evidence from trial on the ground the material facts of the case were undisputed and the dispositive issue was purely legal. More specifically, GBA argued that the Contract violated the federal National Labor Relations Act (hereafter NLRA), 29 United States Code section 141 et seq., particularly section 8, subdivision (d) thereof (hereafter Section 8(d)), and that the Contract was therefore void as a matter of law under Civil Code sections 1608 and 1667.[4] GBA also argued the Contract was invalid as a matter of law because it modified the Agreements between MCA, GBA and the unions; the Agreements required that all modifications be in writing, and the unions had not consented in writing to the Contract. GBA further argued that [p. 7] even if the Contract was not void, the Contract was superseded on July 1, 1994,

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[3] On or about May, 16, 1996, GBA sent a letter to MCA terminating the Contract. It thus seems, and MCA does not argue otherwise, that the Contract is no longer in effect.

[4] Civil Code section 1608 provides: "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." Section 1667 provides: "That is not lawful which is: [¶] 1. Contrary to an express provision of law; [¶] 2. Contrary to the policy of express law, though not expressly prohibited; or, [¶] 3. Otherwise contrary to good morals."

when MCA, GBA, and Local 467 extended the expiration date of the agreements with Local 467 (hereafter the Local 467 Agreements) without incorporating the Contract.

MCA argued in opposition that case law supported the proposition that a collective bargaining agreement that requires modifications to be in writing can nonetheless be modified orally, and that the Contract was valid because the unions orally consented to it. MCA also argued that the Contract did not violate federal labor law, and that GBA was estopped by its conduct from asserting that the Contract was void or invalid. MCA argued in the alternative that the Contract should be viewed as an assignment by both parties to each other of their rights to contributions of Funds from members who switch from one association to the other.

On March 18, 1997, the parties filed a stipulation that the case could be tried on all the papers in the trial court's file, including all the documents the parties submitted in connection with their cross-motions for summary adjudication. The parties further stipulated that they would waive the presentation of live testimony unless the trial court deemed such testimony necessary, and that the trial court could deem the matter submitted on the basis of GBA's motion *in limine*, MCA's opposition thereto, and such argument that the court wished to hear. On the same day, the trial court held a hearing on GBA's motion *in limine*. The court did not hear any live testimony and, at the end of the hearing, took the matter under submission. The court's minutes of March 18 indicate that the court granted GBA's motion without discussion later that day.

On May 6, 1997, MCA filed a notice of appeal from the trial court's March 18 order, characterizing it both as an appealable order and as a judgment. The record, however, did not contain any signed order of the trial court granting GBA's motion *in limine* or a judgment ending the action. We subsequently notified the parties that we would dismiss this appeal unless they provided us a copy of a final, appealable judgment. [p. 8] On May 18, 1998, the parties filed a judgment, entered by the trial court on March 18, 1997 *nunc pro tunc*. We accordingly have jurisdiction over this appeal.

DISCUSSION

I. The Contract Is Not Invalid as a Matter of Law on the Ground It Violates the Requirement in the Agreements That All Modifications Must Be in Writing

The first issue we address is whether the Contract is invalid because it modifies the parties' Agreements with Locals 393 and 467 without the unions' written consent. The issue is raised on the following undisputed facts: The parties' Agreements with Locals 393 and 467 each require that all modifications be in writing signed by a duly authorized representative of the union. The Contract modifies the Agreements between MCA, GBA, and the unions. MCA obtained the unions' oral, but not written, consent to the Contract.

Can a collective bargaining agreement be modified orally when it specifies that it may only be modified in writing?

MCA argues that such collective bargaining agreements may be modified orally, relying on *Certified Corp. v. Hawaii Teamsters & Allied Workers Wkrs.* (9th Cir. 1979) 597 F.2d 1269 (*Hawaii Teamsters*), a case decided by the United States Court of Appeals for the Ninth Circuit. In *Hawaii Teamsters*, the Ninth Circuit held that a written collective bargaining agreement that contained a clause providing that the agreement could not be modified except in writing could nonetheless be orally modified as to its duration. The court thus applied the general common law rule of contracts that "in the absence of a statute preventing oral modification of a contract, a written contract can *always* be orally modified, even if its express terms prohibit modification except in writing." (*Id.* at p. 1271, italics in original.) The Ninth Circuit recognized that courts do not strictly adhere to common law contract rules when interpreting collective bargaining agreements, but nonetheless reasoned that such a rule, applied in the collective bargaining context, "is not contrary to federal labor policies and in fact effectuates the federal policy of maintaining 'industrial peace.' See *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). It [p. 9] encourages resolution of labor disputes by negotiation rather than by the economic pressure of a strike. . . . See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957) [hereafter *Textile Workers*];. . . . " (*Hawaii Teamsters, supra*, 597 F.2d at p. 1271, fn. omitted.)

GBA relies on conflicting authority from the United States Court of Appeals for the District of Columbia Circuit in arguing that the Agreements may not be modified except in writing. In *Martinsville Nylon Employees Council v. N.L.R.B.* (D.C. Cir. 1992) 969 F.2d 1263 (*Martinsville*), the court rejected the Ninth Circuit's reasoning,

and held that when a collective bargaining agreement requires modifications to be in writing, oral modifications are prohibited. The court's conclusion was not based on cases involving collective bargaining agreements, but instead on the Uniform Commercial Code (hereafter UCC). (*Id.* at p. 1267.) The *Martinsville* court stated: "The drawback of the common law rule is that it denies to all contracting parties, no matter how sophisticated, the ability to decide for themselves whether to restrict the manner in which their agreement may be modified. The UCC rule, on the other hand, enables those parties who mutually value certainty in their relations to have it; under the UCC rule, moreover, no one has to agree to rule out oral modifications nor, having so agreed, are the parties precluded from executing a mutually agreeable modification. [¶] The parties to a [collective bargaining agreement], like 'merchants' within the meaning of UCC § 2-104, are sophisticated. Their agreement is the product of substantive negotiations between intensely interested parties, usually advised by specialized counsel. They ought not be presumed to have included in their agreement a meaningless provision against oral modifications. Nor is there any need to fear that either party may have missed the fine print or somehow been taken advantage of in agreeing that there shall be no oral modifications." (*Id.* at p. 1267.)

The court in *Martinsville* disagreed with the Ninth Circuit's observation that applying the common-law rule would promote industrial peace. The court concluded [p. 10] instead that such a rule would more likely result in increased industrial strife. (*Martinsville, supra,* 969 F.2d at p. 1268.) In addition, the court characterized the Ninth

Circuit's holding in *Hawaii Teamsters* as dicta. The court opined that the Ninth Circuit could merely have characterized the modification in that case as an independent oral contract and thereby avoided the question of whether the oral modification was effective. (*Martinsville, supra,* 969 F.2d at p. 1268.)

The parties have not cited, and we have not found through independent research, any opinion by the United States Supreme Court or the California Supreme Court discussing this issue. We therefore exercise our independent judgment as to which line of authority controls. (*Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 879.) We conclude for several reasons that *Hawaii Teamsters* controls.

First, as MCA argues, were we to adopt a rule different from the Ninth Circuit, we would encourage California litigants to forum-shop between California's federal and state courts depending on whether they seek to validate or discredit an oral modification to a collective bargaining agreement. This is a relevant and important consideration that supports adopting the *Hawaii Teamsters* rule. (Accord *Webb v. Superior Court* (1990) 225 Cal.App.3d 990, 1000.)

Second, and more important, we believe, as did Judge Wald in her dissent in *Martinsville,* that *Hawaii Teamsters* is the better-reasoned decision. It is the duty of the federal courts to fashion the rules applicable when interpreting collective bargaining agreements. (*Litton Financial Printing Div. v. NLRB* (1991) 501 U.S 190, 202-203; *Textile Workers, supra,* 353 U.S at pp. 456-457.) Those rules must take into account "the policy of our

national labor laws." (*Textile Workers, supra,* 353 U.S. at p. 456.) "The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining." (*Vaca v. Sipes, supra,* 386 U.S. at p. 182; *McCarroll v. L.A. County Etc. Carpenters* (1957) 49 Cal.2d 45, 56.)

[p. 11] In her dissent in *Martinsville,* Judge Wald argued that the goal of industrial peace is better served by allowing flexibility in the performance of a collective bargaining agreement rather than by maintaining rigid certainty. (*Martinsville, supra,* 969 F.2d at p. 1271, dis. opn of Wald, J.) As support for her position, Judge Wald relied heavily on Justice Goldberg's concurring opinion in *Humphrey v. Moore* (1964) 375 U.S. 335, in which Justice Goldberg wrote: "There are too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties." (*Id.* at pp. 353-354.)

Justice Goldberg has not been alone in his view of collective bargaining agreements. In *Watson v. International Bro. of T., C., W. & H of America* (5th Cir. 1968) 399 F.2d 875, the United States Court of Appeals for the Fifth Circuit stated: "[C]ollective bargaining agreements . . . involve the triangle of often diverging interests of employers, unions, and employees covering a wide range of conduct and an enormous variety of problems. The necessary task of filling in the details is inherent. *A collective bargaining contract operates prospectively over a substantial period of time and the parties cannot be expected to foresee all the problems that will develop in an industrial establishment within the period of the contract and more scope*

must be left for decisions made in the course of performing the agreement. The parties to the collective bargaining agreement share a degree of mutual interdependence for the cost of disagreement is great and the pressure to reach agreement is so intense that the parties are willing to contract with the thought in mind of working out the problems of interpreting and amending when the inevitable problems arise." (*Id.* at p. 879, fn. omitted, italics added.)

Our court has recognized the need for flexibility in the performance of collective bargaining agreements. In *Rebeiro v. Nor-Cal Integrated Ceilings* (1982) 135 Cal.App.3d 522, the court stated: " '[A] collective bargaining agreement is not an ordinary contract' (*John Wiley & Sons v. Livingston* (1963) 376 U.S. 543, 550) and is not governed by the common law concepts that control private contracts. (*Carpenters 46* [p. 12] *Northern Cal. Counties Conf. Bd. v. Valentine* (1982) 131 Cal.App.3d 534.) *'[I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.'* (*Steelworkers v. Warrior & Gulf Co.* (1959) 363 U.S. 574, 578.)" (*Rebeiro v. Nor-Cal Integrated Ceilings, supra,* 135 Cal.App.3d at p. 532, italics added.)

GBA argues that the desire for flexibility is satisfied by allowing the parties to a collective bargaining agreement to decide how the agreement may be modified. We disagree because, as the above-cited authorities persuasively demonstrate, the need for flexibility stems from the fact that the parties to a collective bargaining agreement cannot anticipate every problem that may arise *after* an agreement is entered into. We agree with Judge Wald and the *Hawaii Teamsters* court that the goal of industrial peace is better served by allowing the parties to a collective bargaining agreement to modify the agreement orally

even if the agreement contains a provision requiring modifications to be in writing.

We disagree with the *Martinsville* majority on three other points as well. First, we join Judge Wald in questioning the *Martinsville* majority's comparison of collective bargaining agreements to standard commercial sales contracts. As the authorities cited by Judge Wald demonstrate, labor law experts dispute the majority's implicit conclusion that collective bargaining agreements are sufficiently similar to standard sales contracts as to justify application of the UCC. (*Martinsville, supra,* 969 F.2d at p. 1271, fn. 1, and authorities cited therein.) Indeed, the United States Supreme Court has recognized that "[a] collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts." (*Consol. Rail Corp. v. Railway Labor Executives* (1989) 491 U.S. 299, 311, internal quotation marks omitted.)

Second, while application of the *Hawaii Teamsters* rule may render the modification-in-writing provision in a collective bargaining agreement meaningless, the *Martinsville* majority overstated the significance of this concern. (See *Martinsville,* [p. 13] *supra,* 969 F.2d at p. 1267.) It is well settled that courts do not rigidly apply the normal rules of contract interpretation when interpreting collective bargaining agreements. (*Hawaii Teamsters, supra,* 597 F.2d at p. 1271; *Rebeiro v. Nor-Cal Integrated Ceilings, supra,* 135 Cal.App.3d at p. 532.) Thus, the fact that the modification-in-writing provision of a collective bargaining agreement ultimately may be unenforceable does not justify inflexible adherence to it.

Third, the *Martinsville* majority's characterization of the *Hawaii Teamsters* decision as dicta is ironic in light of the fact that the majority stated plainly that it did not have to decide whether to choose between the UCC rule and the common law rule applied in *Hawaii Teamsters* because the collective bargaining agreement at issue in *Martinsville* contained an "entire agreement" clause. The *Martinsville* court stated: "Whatever the ultimate merits of the common law rule denying effect to the no-oral-modification clause, by including the entire agreement clause the parties here made clear beyond doubt their intention not to be bound to any informal arrangement to which they might voluntarily adhere during the term of their CBA." (*Martinsville, supra,* 969 F.2d at p. 1268.) Thus, the *Martinsville* majority's expressed preference for the UCC rule in this context may itself be characterized as dicta.

We reject GBA's assertion that we should disregard *Hawaii Teamsters* because it is a "legal dinosaur." GBA cites no authority, nor are we aware of any, that makes the mere age of an opinion relevant in determining its precedential value. As our foregoing discussion demonstrates, the logical force of *Hawaii Teamsters* has not diminished over time. Moreover, contrary to GBA's assertion, the *Hawaii Teamsters* rule has been cited with approval fairly recently by at least two other federal circuit courts of appeal and one federal district court. (See *Merk v. Jewel Food Stores* (7th Cir. 1991) 945 F.2d 889, 895; *Eastern Air Lines v. Air Line Pilots Ass'n* (11th Cir. 1988) 861 F.2d 1546, 1555; *N.L.R.B. v. Deauville Hotel* (11th Cir. 1985) 751 F.2d 1562, 1569, fn. 10; *Local 1316, I. Bro. of E.W. v. Superior C. & A.* (N.D.Ga. 1985) 608 F.Supp. 1246, 1250.)

And, in fact, two of [p. 14] the cases cited by GBA as supporting the *Martinsville* rule themselves predate *Hawaii Teamsters*. (See *Lewis v. Seanor Coal Company* (3d Cir. 1967) 382 F.2d 437; *Gatliff Coal Co. v. Cox* (6th Cir. 1945) 152 F.2d 52.) Thus, GBA's characterization of *Hawaii Teamsters* as a "legal dinosaur" is unwarranted and, in any event, unpersuasive.

Finally, GBA cites Civil Code section 1698 as being in accord with *Martinsville*. Section 1698, subdivision (c) provides: "(c) *Unless the contract otherwise expressly provides*, a contract in writing may be modified by an oral agreement supported by new consideration. . . . " (Italics added.)

While Civil Code section 1698, subdivision (c) arguably supports GBA's position, we must keep in mind that we are here dealing with collective bargaining agreements, the interpretation of which is a matter of federal, not state, law. (*Litton Financial Printing Div. v. NLRB, supra*, 501 U.S. at pp. 202-203; *Textile Workers, supra*, 353 U.S. at pp. 456-457.) We have acknowledged the split of authority among the federal courts on the issue before us, and have concluded that the better view allows oral modifications of a collective bargaining agreement even if the agreement specifies that modifications must be in writing. Civil Code section 1698, subdivision (c), a state statute, cannot serve to prohibit what federal law allows. (*Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 210-211 (*Allis-Chalmers*);[5] *Fox*

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[5] In *Allis-Chalmers*, the United States Supreme Court stated: "If the policies that animate § 301 [of the Labor Management

v. General Motors Corp. (S.D.W.Va. 1994) 859 F.Supp. 216, 219, fn. 5.)[6]

Relations Act] are to be given their proper range . . . , the pre-emptive effect of § 301 must extend beyond suits alleging contract violations. These policies require that 'the relationships created by [a collective-bargaining] agreement' be defined by application of 'an evolving federal common law grounded in national labor policy.' [Citation.] The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract. [¶] Were state law allowed to determine the meaning intended by the parties in adopting a particular contract phrase or term, all the evils addressed in [*Teamsters v. Lucas Flour Co.* (1962) 369 U.S. 95] would recur. The parties would be uncertain as to what they were binding themselves to when they agreed to create a right to collect benefits under certain circumstances. As a result, it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate. Exclusion of such claims 'from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.' [Citation.]" (*Allis-Chalmers, supra,* 471 U.S. at pp. 210-211.)

[6] This is not to say that no statute could ever preclude oral modification of a collective bargaining agreement. For example, in *Lewis v. Seanor Coal Company, supra,* 382 F.2d at page 442, the court held that an oral modification to a provision in a collective bargaining agreement requiring the employer to make

[p. 15] For these reasons, we conclude that the Ninth Circuit's decision in *Hawaii Teamsters* shall control in this case. Consequently, the fact that Locals 393 and 467 did not consent in writing to the Contract does not amount to a violation of the Agreements. The Contract is not invalid as a matter of law on this ground.

II. Under the Circumstances of This Case, GBA's Contention That the Contract Violates the Notice Requirements of Section 8(d) of the NLRA Cannot Serve as a Ground on Which to Declare the Contract Void

GBA also contends the Contract is void because it violates the notice requirements set forth in Section 8(d) of the NLRA. The unstated implication is that MCA's alleged violation of Section 8(d) is an unfair labor practice under the NLRA.

"Contracts that are contrary to express statutes or to the policy of express statutes . . . are illegal contracts. [Citation.] Any such illegality voids the entire contract. [Citation.]" (*Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 73.)

[p. 16] Section 8(d) provides, in pertinent part, that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good

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payments to a union welfare trust fund was invalid in large part because a federal statute required that the detailed basis on which such payments were to be made had to be specified in writing.

faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification – [¶] (1) serves a written notice upon the other party to the contract of the proposed termination or modification . . . [and] [¶] (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; . . . " (29 U.S.C. § 158, subd. (d)(1), (3).)

Here, it is undisputed that MCA did not furnish the unions or the appropriate state and federal agencies with written notice pursuant to Section 8(d) before MCA and GBA executed the Contract. Generally, an employer's failure to provide the notice required under Section 8(d) before modifying or terminating a collective bargaining agreement has been held to be an unfair labor practice. (See *Nabors Trailers, Inc. v. N.L.R.B.* (5th Cir. 1990) 910 F.2d 268, 276; *Ariz. Laborers, Etc. v. Conquer Cartage Co.* (9th Cir.

1985) 753 F.2d 1512, 1516-1517; *McCarroll v. L.A. County Etc. Carpenters, supra,* 49 Cal.2d at pp. 56-57.)

MCA nonetheless opposes GBA's contention on two grounds. First, MCA contends the notice requirement does not apply to the Contract because the Contract was [p. 17] negotiated only between MCA and GBA and therefore does not constitute "collective bargaining" within the meaning of Section 8(d). At most the Contract is a midterm modification of the Agreements as to which the notice requirement does not apply. Second, MCA contends that the National Labor Relations Board (hereafter NLR) has exclusive jurisdiction to remedy violations of Section 8(d).

In *N.L.R.B. v. Local 554* (7th Cir. 1993) 991 F.2d 1302, the United States Court of Appeals for the Seventh Circuit upheld an NLRB determination that the notice requirements of Section 8(d) do not apply to renegotiations of collective bargaining agreements that take place prior to the natural expiration of the agreements. (*Id.* at p. 1306.) The court stated: " . . . [T]he [NLRB] concluded that Section 8(d) applies to termination or modification of a collective bargaining relationship taking place after the natural expiration of the labor contract. It does not apply to circumstances of renegotiation taking place prior to the natural expiration of the labor contract. We need not debate the relative policy advantages of requiring or not requiring such notice in cases of renegotiation. Congress left that task to the Board by conferring upon it the responsibility to formulate national labor policy. The Board has spoken decisively in this case against the need for Section 8(d) notice in circumstances of renegotiation. We defer to the Board's conclusion, finding it neither

irrational nor inconsistent with the purposes of the Act. There are good reasons not to require notice where the same exigencies which caused the need for renegotiation might make a prolonged notice period impractical." (*N.L.R.B. v. Local 554, supra,* 991 F.2d at p. 1306.)

Here, according to GBA's own brief, the Agreements with Local 393 were originally set to expire on June 30, 1995. The Local 467 Agreements were year-to-year, from July 1 to June 30 of each year. Clearly, the Contract, which was implemented between December 1993 and January 1994, was a midterm modification of those Agreements. It is arguable, therefore, that the notice requirements of Section 8(d) were [p. 18] not applicable. (*N.L.R.B. v. Local 554, supra,* 991 F.2d at p. 1306.) Thus, it is not at all clear that MCA committed an unfair labor practice in this case.

This brings us to the main problem with GBA's contention. The NLRB has exclusive jurisdiction to adjudicate disputes involving alleged unfair labor practices. (See *San Diego Unions v. Garmon* (1959) 359 U.S. 236, 244-245; *Machinists Automotive Trades Dist. Lodge v. Peterbilt Motors Co.* (1990) 220 Cal.App.3d 1402, 1407 ["where the activity which is the subject of suit is either arguably prohibited or arguably protected by the NLRA, state court jurisdiction must yield to the exclusive jurisdiction of the NLRB"].) Indeed, the United States Supreme Court has stated that "[t]he [NLRB] is vested with primary jurisdiction to determine *what is or is not an unfair labor practice.*" (*Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 83, italics added.) Although there are exceptions to this rule of preemption (see, e.g., *Rodriguez v. Yellow Cab Cooperative, Inc.* (1988) 206 Cal.App.3d 668, 676-677), where, as

here, the dispute centers on whether the challenged conduct violated the collective bargaining process itself, none of those exceptions apply (see 29 U.S.C. § 151; *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 753-754; *N.L.R.B. v. R&H Coal Co., Inc.* (4th Cir. 1993) 992 F.2d 46, 50, fn. 2; *Rodriguez v. Yellow Cab Cooperative, Inc., supra,* 206 Cal.App.3d at pp. 676-678).

Accordingly, were we to conclude that MCA committed an unfair labor practice we would be exceeding our jurisdiction and impinging on the jurisdiction of the NLRB. Therefore, in the context of this case MCA's alleged violation of Section 8(d) cannot serve as a basis for this court to declare the Contract void as a matter of law.

III. The Parties' July 1, 1994 Extension of the Local 467 Agreements Did Not Supersede the Contract as a Matter Of Law

GBA also contends that even if the Contract validly modified the parties' Agreements, the Contract was superseded with respect to the parties' Agreements with Local 467 when those Agreements were extended effective July 1, 1994. This contention is based on an integration clause contained in the Local 467 Agreements. The integration [p. 19] clause provides: "This agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the parties shall be bound by or liable for, any statement, representation, promise, inducement, or agreement not set forth herein." According to GBA, the Contract did not survive past July 1, 1994, because it was never added,

expressly or otherwise, to the extended Agreements with Local 467.

GBA's contention is flawed in two respects. First, accepting GBA's argument at face value, the trial court would have been justified in excluding evidence concerning Local 467's consent to the Contract. Since GBA has specifically confined this argument to the Local 467 Agreements, and since the record apparently does not contain any evidence that would allow this argument to encompass the Agreements with Local 393, this argument provides no justification for the trial court's exclusion of MCA's evidence concerning the Agreements with Local 393.

Second, and more important, it is not clear that the Contract was rendered inoperative as a matter of law by the integration clause of the extended Local 467 Agreements. As MCA argues, "collective-bargaining agreements may include implied, as well as express, terms." (*Consol. Rail Corp. v. Railway Labor Executives, supra,* 491 U.S. at p. 311.) "An employer's established past practice can become an implied term of a collective bargaining agreement. [Citations.] Past practices rise to the level of an implied agreement when they have ripened into an established and recognized custom between the parties. [Citations.]" (*Bonnell/Tredegar Industries, Inc. v. N.L.R.B.* (4th Cir. 1995) 46 F.3d 339, 344, internal quotation marks omitted [employer's established past practice of paying Christmas bonus can become implied term of collective bargaining agreement and employer's attempt not to disburse bonus after 18-year history of paying it violates NLRA]; see also *Martinsville, supra,* 969 F.2d at pp. 1269-1270.) Whether a past practice is an implied term of

a collective bargaining agreement is a question of fact. (See *Lodge No. 306 v. Alton & Southern Ry. Co.* (8th Cir. 1988) 849 F.2d 1111, 1114; cf. [p. 20] *Local 512, Warehouse & Office Workers' v. N.L.R.B.* (9th Cir. 1986) 795 F.2d 705, 712 [whether parties have agreed on terms of collective bargaining agreement is question of fact].)

Here, there is evidence in the record indicating that the procedure set forth in the Contract by which members of either MCA or GBA could switch membership to the other association may well have become an implied term of the Agreements. Moreover, there is no evidence that MCA, GBA, or Local 467 did not intend to continue that procedure as an implied term of the extended Local 467 Agreements. Indeed, the evidence suggests to the contrary that Local 467 may have believed that the procedure remained in place after the Local 467 Agreements were extended.

It may well be that a trial upon these matters would reveal that the parties in fact intended to supersede the Contract when they agreed to extend the Local 467 Agreements. Under the circumstances of this appeal, however, we cannot conclude that the extended Agreements superseded the Contract as a matter of law.

IV. Remaining Arguments

The remainder of the parties' arguments on appeal merit little or no discussion. In light of our conclusion that the Contract is not invalid or void as a matter of law, we decline to consider MCA's contentions that GBA has waived its right to challenge the validity of the Contract, and that the Contract should be deemed an assignment of

rights to Funds by the parties. Nor need we reach GBA's contention that MCA is barred for various reasons from raising the aforementioned issues on appeal.

The only remaining issue that merits brief comment is GBA's contention that MCA is barred from presenting evidence of the unions' oral consent to the Contract by the parol evidence rule. According to GBA, such evidence would contradict the fact that only MCA and GBA were parties to the Contract. Assuming arguendo that the Contract is a partially integrated writing, as GBA asserts, GBA fails to cite any evidence proffered by MCA suggesting that the unions or MCA considered the unions to be parties to the [p. 21] Contract. Indeed, MCA admits on appeal that it is not claiming that the unions were parties to the Contract. The evidence at most demonstrates that the unions consented to and recognized the membership change procedure set forth in the Contract. In our view, that evidence is not inconsistent with the Contract and is therefore not barred under the parol evidence rule. (*Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 637.)

DISPOSITION

The judgment is reversed. This matter is remanded to the trial court for further proceedings in accordance with the views expressed in this opinion. The parties are to bear their own costs.

[p. 22] _____
Jones, Acting P.J.

We concur:

Haning, J.

Champlin, J.*

* Judge of the Superior Court of Napa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[p. 23] Trial court:	San Mateo County Superior Court
Trial judge:	Hon. Judith W. Kozloski
–	
Counsel for plaintiff and appellant:	James A. Carter Michelle Q. Carter Carter & Carter
Counsel for defendant and respondent:	Daniel A. Croley Salime Samii Littler Mendelson

A078491

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APPENDIX B

First Appellate District, Division Five, No. A078491
S074143

IN THE SUPREME COURT OF CALIFORNIA

(Filed Dec. 16, 1998)

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CAL, Appellant

v.

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, Respondent

---

Respondent's petition for review DENIED.

GEORGE
Chief Justice

APPENDIX C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE:
JUDITH WHITMER
KOZLOSKI JUDGE
DEPT. NO.: 10
Linda Fitzgibbon **CLERK**
Pamela Fisk **REPORTER**
DATE: March 18, 1997
FILE NO: 394184

(TITLE OF ACTION)
MECHANICAL CONTRACTORS ASSOCIATION OF NOTHERN CALIFORNIA

Plaintiff

vs.

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS

Defendant

(APPEARANCES)
J. CARTER FOR PLAINTIFF

DANIEL A CROLEY FOR DEFENDANT SALIME' SAMII FOR DEFT.

NATURE OF PROCEEDINGS COURT TRIAL

9:15 A.M. COURT CONVENED. COUNSEL AS LISTED ABOVE PRESENT. THE MATTER WAS ORALLY ARGUED BY COUNSEL AND SUBMITTED. MATTER TAKEN UNDER SUBMISSION.

3:00 P.M. HEARING IN THE ABOVE ENTITLED MATTER HAVING BEEN HELD AND THE MATTER SUBMITTED TO THE COURT FOR CONSIDERATION AND DECISION, AND THE COURT NOW BEING FULLY ADVISED IN THE PREMISES HEREIN RENDERS ITS DECISION AS FULLY SET FORTH BELOW:

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE ALL OF MCA'S EVIDENCE FROM TRIAL IS GRANTED."

DATE: March 18, 1997
NATURE OF PROCEEDINGS: _____000___

APPENDIX D

29 U.S.C. § 158. Unfair labor practices

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer

engaged in the particular labor dispute, for the purposes of sections 158, 159 and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

APPENDIX E

COURT OF APPEAL, STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

MECHANICAL CONTRACTORS ASSOCIATION, ETC., Plaintiff/Appellant	Court of Appeal No. A078491
vs.	
GREATER BAY AREA ASSOCIATION, ETC., Defendant/Respondent	Superior Court No. 394184

CLERK'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR AND MUNICIPAL COURTS, STATE OF CALIFORNIA, COUNTY OF SAN MATEO

HONORABLE JUDITH W. KOZLOSKI, JUDGE

NOTICE OF APPEAL FILED MAY 6, 1997

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Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

Summons Issued
IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California Corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California Corporation, Defendant.	**Case No. 394184** **COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT AND FOR DECLARATORY JUDGMENT** **JURY DEMANDED** **(Filed OCT. 24, 1995)**

Plaintiff alleges:

1. Plaintiff MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA (hereafter "MCA") is a California corporation doing business as an

association of licensed mechanical and plumbing contractors which acts as collective bargaining agent on behalf of its members. MCA's principal place of business is in the County of Contra Costa, State of California.

[p. 2] 2. Defendant GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS (hereafter "GBA") is a California corporation doing business as an association of mechanical and plumbing contractors with its principal place of business in the State of California, County of San Mateo.

3. Venue is proper in this County because, *inter alia*, defendant's primary place of business is located in this County and because the contract at issue herein was entered into here.

4. MCA and GBA are competitors, to wit, each acts as bargaining agent for its members in conjunction with the applicable unions for purposes of both the negotiations leading to collective bargaining agreements and the administration of those agreements.

5. Both GBA and MCA are parties to separate collective bargaining agreements (on behalf of their constituent members) with various unions under which both MCA's and GBA's members perform contracting services. Those collective bargaining agreements provide for the payment of contract administration and industry funds ("funds") which are monies earned by the respective associations for all work performed by union members under the collective bargaining agreements to which that association is signatory. Under the provisions of these collective bargaining agreements, "funds" are initially paid by the member contractor to a trust administrator

which then distributes them to the appropriate association.

6. During 1993, certain disputes arose between MCA and GBA concerning the ability of contractor-members to change [p. 3] associations while the applicable collective bargaining agreement remained in force, and the allocation of "funds" paid by those members after they changed associations.

7. Prior to the disputes between MCA and GBA referred to in paragraph 6, *supra*, both MCA and GBA had joined a newly formed statewide association of contractors, the "CPMCA". GBA had contributed $5,000 of "seed money" to CPMCA while MCA had not contribute any "seed money". GBA subsequently changed its mind and decided to withdraw from CPMCA. Because of a shortage of cash, CPMCA was unable to immediately refund GBA's "seed money".

8. In an effort to resolve their disputes and avoid litigation, representatives of MCA and GBA (including the President of each association) met in December of 1993. At that meeting, MCA proposed an agreement with GBA whereby: (1) MCA would give GBA $5,000 immediately in exchange for an assignment of GBA's right to recoup its "seed money" from CPMCA; (2) the disputes between MCA and GBA were deemed resolved; and (3) to avoid repetitions of the disputes in the future, both associations would agree that their rights to "funds" paid under the relevant collective bargaining agreements be modified by a new agreement which provided that either association's members could switch associations by giving written notice to both associations, the change to be

effective on the anniversary date of the applicable collective bargaining agreement (July 1), and that "funds" which were earned after the effective date of the association change would be paid to the member's new association.

9. Because the modification of collective bargaining [p. 4] agreements proposed by MCA's offer would require the consent of the affected unions (who were signatory to those agreements), MCA sought the advance approval of the unions. The business managers for both of the affected unions (U.A. Locals 467 and 393) stated that they did not want to become involved in the disputes between associations. Both unions stated to MCA that they would accept whatever agreement was reached by MCA and GBA with respect to members who wished to change associations.

10. By their conduct described in paragraph 9, *supra*, the unions waived the provision of the collective bargaining agreements which required all changes to be in a writing signed by a duly authorized representative of the union.

11. By letter dated January 7, 1994, MCA formalized its prior proposal into a formal written offer which it mailed, along with a check for the $5,000 made out to GBA, to GBA's President, Ron Peterson. The offer, by its terms, was to be accepted by Peterson initialing the letter (as confirmation of GBA's agreement) after getting authorization from GBA's Board of Directors. The letter also explicitly stated that GBA was to return the check if it did not accept the offer.

12. Several days later, Peterson responded to MCA that he would present the offer to GBA's Board of Directors for approval.

13. On or about January 20, 1994, GBA's President Ron Peterson initialed the letter and returned it to MCA, manifesting GBA's acceptance of the offer. A true and correct copy of this executed letter agreement (hereafter "MCA-GBA agreement") is attached hereto as Exhibit "A".

[p. 5] 14. On the same date, GBA sent confirmation to CPMCA that "MCA has taken GBA's position for 'seed money' ". A true and correct copy of that notification is attached hereto as Exhibit "B".

15. On or about the same date, GBA also cashed the $5,000 check as authorized upon its acceptance of the "MCA-GBA agreement".

16. Soon thereafter at a legislative conference in Sacramento, GBA's then Vice-President (Frank Park) independently confirmed the settlement (i.e. GBA's acceptance of MCA's offer) to MCA's Executive Vice-president (Scott Strawbridge) and expressed his satisfaction that the past problems between their respective associations had been resolved.

17. MCA has relied in good faith, and to its detriment, on the existence of the MCA-GBA agreement by, *inter alia*: transferring certain fund contributions ($570.38) to GBA when GBA claimed to have provided services for the member even though the affected member (Metro Plumbing) had changed its affiliation to MCA as provided in the agreement, and by allowing Egan Plumbing

to change from MCA to GBA even though it would not have done so in the absence of the MCA-GBA agreement.

FIRST CAUSE OF ACTION
(Breach of Contract)

18. Plaintiff incorporates the allegations of paragraphs 1 through 17 of the complaint by reference as though fully set forth herein.

19. The MCA-GBA agreement remained in force and was [p. 6] respected by both parties from January 20, 1994 until June of 1995 when two of GBA's members (R.L. Peterson Co. and Design Mechanical) submitted the written notice of intent to change to MCA effective on the next anniversary date (July 1, 1995) as authorized by the MCA-GBA agreement. GBA notified both of the affected unions (U.A. Locals 467 and 393) in writing that it did not agree to the transfer and directed the administrator that all fund contributions from those two employers were to continue to be paid to GBA.

20. Upon being notified by the unions and the administrator that GBA was objecting to the switch of associations, MCA's Executive Vice-president (Scott Strawbridge) contacted GBA's new President (Frank Park) to inquire regarding GBA's intentions. Park responded that both contractors were still members of GBA and that GBA did not recognize the transfer as valid. Because payment of the contributions from the unions were not due until August 15, Strawbridge agreed to give GBA until August 9 to consult with legal counsel before taking any action.

21. On August 9, 1995, Park orally notified Strawbridge that GBA's Board of Directors had consulted with counsel and it was still their position that the two contractors were members of GBA and that GBA would not accept the transfer. GBA notified the trust administrator of its position refusing to honor the transfer and demanded that "funds" from Peterson Co. and Design Mechanical continue to be paid to GBA and not to MCA.

22. By refusing to honor the transfer to MCA of former members Peterson Co. and Design Mechanical, despite their [p. 7] compliance with the conditions for such transfer as set forth in the MCA-GBA agreement, GBA has materially breached the MCA-GBA agreement. GBA's breaches of the MCA-GBA agreement are ongoing as Peterson Co. and Design Mechanical continue to pay funds to the trust administrator who, despite Peterson Co.'s and Design Mechanical's compliance with the conditions for transfer of associations set forth in the MCA-GBA agreement, continues to pay the "funds" from those two contractors to GBA not MCA.

23. As a proximate result of GBA's breach of the MCA-GBA agreement, MCA has been damaged in an amount to be proven at trial. MCA will continue to suffer additional damages as GBA continues to interfere with MCA's right to additional "funds" paid by Peterson & Co. and Design Mechanical (and any other member who wishes to transfer to MCA) to the trust administrator.

24. Because the sums owing to MCA by virtue of GBA's breach of the MCA-GBA agreement are capable of being made certain by calculation, and because MCA's right to such "funds" vested at an ascertainable time,

MCA is entitled to prejudgment interest on all "funds" found owing at the legal rate under Civil code section 3287(a).

SECOND CAUSE OF ACTION
(Declaratory Judgment)

25. Plaintiff incorporates the allegations of paragraphs 1 through 21 of the complaint by reference as though fully set forth herein.

26. While MCA contends that the MCA-GBA agreement is a legally binding and enforceable contract, GBA now contends that [p. 8] the January 7, 1994 letter " . . . is ineffective to defeat the explicit terms of the collective bargaining agreement because the letter was not entered into by the parties to the collective bargaining agreements, it is not supported by adequate consideration, and it was not intended to pertain to the term of the current collective bargaining agreements." Attached hereto as Exhibit "C" is a true and correct copy of GBA's counsel's letter setting forth GBA's position.

27. MCA submits that none of GBA's arguments have merit. First, as alleged in paragraph 9, *supra*, the other "party" to the collective bargaining agreements (the unions) agreed **in advance** that it would accept whatever agreement MCA and GBA could reach between themselves. Second, the $5,000 payment to GBA which MCA had no "prior duty" to make clearly constituted "consideration" for the MCA-GBA agreement. Alternatively, consideration is not required for the agreement under the doctrine of promissory estoppel because MCA reasonably relied to its detriment, as alleged in paragraph 16, *supra*,

upon GBA's promise to honor the MCA-GBA agreement. Third, at the time of execution of the MCA-GBA agreement it was interpreted by both MCA and GBA to apply to the current collective bargaining agreements (including the 1994 contract extensions) and MCA has relied to its detriment upon such interpretation as alleged hereinabove. Accordingly, GBA is now estopped from asserting a new and different interpretation.

28. An actual controversy has arisen between MCA and GBA over the enforceability and terms of the MCA-GBA agreement.

29. Accordingly, MCA requests that this Court enter a [p. 9] Declaratory Judgment that: (1) the unions have waived the provision in the collective bargaining agreements requiring all modification to be in a writing signed by a duly authorized representative of the unions; (2) the MCA-GBA agreement is supported by consideration or, in the alternative, none is required under the doctrine of promissory estoppel; and (3) the MCA-GBA agreement became effective upon the date of execution by GBA and applies to all collective bargaining agreements (including the 1994 contract extensions) to which GBA was a party on the date of execution of the MCA-GBA agreement.

WHEREFORE, MCA prays for judgment against GBA as follows:

On First Cause of Action:

1. Compensatory damages according to proof: and

2. Costs of suit herein incurred: and

3. Such other and further relief as the Court deems just and proper.

On Second Cause of Action:

1. A Declaratory Judgment that: (A) the MCA-GBA agreement is a binding and enforceable contract and (B) the MCA-GBA agreement applies to all collective bargaining agreements to which GBA was a party on the date of execution of the MCA-GBA agreement.

Dated: October 24, 1995

CARTER & CARTER

By: /s/ Brian M. Carter
Brian M. Carter
Attorneys for Plaintiff

[p. 10] **EXHIBIT A**

[p. 11] **MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA**

940 Adams, Suite F
Benicia, CA 94510
(800) 640-5152
(707) 746-6484
FAX (707) 746-5384

[LOGO] [LOGO]

7 January 1994

Ron Peterson, President
GBA
c/o R. L. Peterson Company
P.O. Box 2267
Menlo Park, CA 94026

Dear Ron:

As a follow up to our December luncheon and subsequent phone calls, MCA would like to offer the following:

* MCA has attached a check for $5,000 made out to GBA.

* GBA may cash if the following is agreed to:

1) GBA writes CPMCA and relinquishes its claim to its *"seed money"* and informs CPMCA that MCA has taken GBA's position for *"seed money."* It will then be up to MCA and CPMCA to work out details as to the disposition of that *"seed money."*

2) The dispute between MCA and GBA is settled concerning the representation and employer trust funds of Madlem Mechanical and Thermal Mechanical.

3) Per our luncheon discussion, MCA would like to establish the following procedure to avoid any future such problems:

> It is agreed between MCA and GBA that no signatory contractors may switch Associations without notifying their respective Associations in writing and that switch (as far as employer trust funds) is made on next the anniversary date of the collective bargaining agreement; i.e., a signatory contractor from MCA who wishes to become signatory with GBA would notify MCA that he wishes to switch in writing. Currently the agreements in Local 467 and Local 393 have an anniversary date of July 1 each year. Hours starting on the next July 1 could be switched to the new Association.
>
> [p. 12] Ron I hope this settlement, without prejudice, is acceptable to GBA. We see it as a win-win situation.
>
> * GBA get its $5,000 seed money back immediately versus waiting for the March CPMCA Board Meeting and then the seed money may only be returned in the progress payments.
>
> * The dispute between MCA and GBA is over.
>
> * A procedure for the future is established.

If the above settlement is acceptable, please have the GBA Board authorize you to initial this letter and the check can be cashed. If it is not acceptable, please return the check.

Thank you for your help and please feel free to contact me if you have any questions.

Sincerely,

/s/ Scott
Scott W. Strawbridge
Executive Vice President

SS:nw

Enclosure

cc: MCA Board
Jim Carter

R

[p. 13] **EXHIBIT B**

[p. 14] [LOGO]

Greater Bay Area Association of
Plumbing and Mechanical Contractors, Inc.

2672 Bayshore Parkway – Suite 531
Mountain View, CA 94043
Telephone: (415) 965-0100 • Fax: (415) 965-0111

January 20, 1994

Elaine J. Rose
CPMCA
50 Fullerton Ct., Ste. 201
Sacramento, CA 95825

Dear Elaine:

GBA would like to relinquish our claim to the "seed money." MCA has taken GBA's position for the "seed money."

We wish you much good luck at CPMCA and look forward to seeing you at the Western Mechanical Conference in March, 1994.

Thank you for the invitation to re-join CPMCA should we once again change our minds.

Sincerely,

/s/ Norma
Norma Y. Singer
Executive Director

NYS:as

cc: Scott Strawbridge
MCA

[p. 15] **EXHIBIT C**

[p. 16] LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
650 CALIFORNIA STREET, 20TH FLOOR
SAN FRANCISCO, CALIFORNIA 94108-2693
(415) 433-1940
FAX (415) 399-8490

[Letterhead Omitted In Printing]

September 25, 1995

WRITER'S DIRECT DIAL
(415)399-8447
WRITER'S DIRECT FAX

James A. Carter, Esq.
Carter & Carter
425 California Street, 19th Floor
San Francisco, California 94104

RE: Greater Bay Area Association Of Plumbing & Mechanical Contractors, Inc./MCA

Dear Jim:

Since writing to you on August 28, 1995, I have had a chance to meet with representatives of GBA.

As stated in my earlier letter, it is GBA's position that the collective bargaining agreements which require payments to GBA on behalf of the entities which were members of GBA at the inception of the current contracts are controlling, and that GBA continues, therefore, to be entitled to Fund contributions from those companies. Additionally, the January 7, 1994, letter is ineffective to defeat the explicit terms of the collective bargaining agreements because the letter was not entered into by the parties to

the collective bargaining agreements, it is not supported by adequate consideration, and it was not intended to pertain to the term of the current collective bargaining agreements.

Very truly yours,

/s/ George
GEORGE J. TICHY, II

GJT:lm
JMS;497.95; lm

[p. 17] **GEORGE J. TICHY, II CSB, 941146**
JOHN M. SKONBERG, CSB 069409
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a CALIFORNIA CORPORATION,	**Case No. 394184**
Plaintiff,	**DEFENDANT GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS ANSWER TO UNVERIFIED COMPLAINT**
v.	
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a CALIFORNIA CORPORATION,	
Defendant.	(Filed Nov. 27, 1995)

[p. 18] Defendant Greater Bay Area Association of Plumbing and Mechanical Contractors ("Defendant")

answers the unverified Complaint of Mechanical Contractors Association of Northern California ("Plaintiff") as follows:

I

GENERAL DENIAL

1. Defendant generally denies each and every allegation of Plaintiff's unverified Complaint.

II

AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to Plaintiff's Complaint, and alleged causes of action, and each of them, Defendant alleges as follows:

FIRST AFFIRMATIVE DEFENSE

1. Plaintiff's Complaint and alleged causes of action, and each of them, fail to state facts sufficient to constitute a cause of action against Defendant.

SECOND AFFIRMATIVE DEFENSE

2. Plaintiff's claims are preempted in whole or in part by the National Labor Relations Act (the "NLRA"), including without limitation, section 8(d) of the NLRA. 29 U.S.C. § 141, *et seq.*

THIRD AFFIRMATIVE DEFENSE

3. Plaintiff's Complaint and causes of action, and each of them, alleges an agreement which is unlawful under the NLRA, including without limitation, section 8(d) of the NLRA; thus, the agreement is void under Civil Code sections 1608 and 1667. 29 U.S.C. § 141, *et seq.*

[p. 19] **FOURTH AFFIRMATIVE DEFENSE**

4. Plaintiff's Complaint and causes of action, and each of them, are barred by, or the relief Plaintiff seeks is unavailable under, the principle of Mistake of Fact.

FIFTH AFFIRMATIVE DEFENSE

5. Defendant is informed and believes and thereon alleges that Plaintiff has failed to avoid or minimize any and all damages which are alleged to have been caused by Defendant, and Defendant's liability to Plaintiff, if any, should be denied or reduced accordingly.

SIXTH AFFIRMATIVE DEFENSE

6. Plaintiff's Complaint and causes of action, and each of them, are barred, or the relief Plaintiff seeks is unavailable, in whole or in part by Plaintiff's fraudulent misrepresentations and/or omissions.

SEVENTH AFFIRMATIVE DEFENSE

7. Plaintiff's Complaint and causes of action, and each of them are barred by, or the relief which Plaintiff seeks is unavailable under, the doctrine of estoppel.

EIGHTH AFFIRMATIVE DEFENSE

8. Plaintiff's Complaint and causes of action, and each of them, are bared or excused by Plaintiff's failure of performance.

NINTH AFFIRMATIVE DEFENSE

9. Plaintiff's Complaint and alleged causes of action, and each of them, fail to state a claim against Defendant because Local 393 and/or Local 467 are not parties to the agreement(s) and/or contract modification(s) alleged.

[p. 20] **TENTH AFFIRMATIVE DEFENSE**

10. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the agreement(s) alleged was not authorized or ratified in whole or in part by Defendant.

ELEVENTH AFFIRMATIVE DEFENSE

11. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the agreement(s) alleged is not supported in whole or in part by adequate consideration.

TWELFTH AFFIRMATIVE DEFENSE

12. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the alleged entry into the alleged agreement(s) is an ultra vires act.

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiff take nothing by its Complaint.

2. For its costs incurred herein; and

3. For such other and further relief as the Court may deem just and proper.

Dated: November 27, 1995

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
GEORGE J. TICHY, II
JOHN M. SKONBERG
DANIEL A. CROLEY

By: /s/ Daniel A. Croley
DANIEL A CROLEY

Attorneys For Defendant
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS

[p. 21] **PROOF OF SERVICE BY MAIL**

I, GLORIA M. DUNLAP, hereby declare and state:

I am over the age of eighteen years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 650 California Street, 20th Floor, San Francisco, California 94108-2693.

On November 27, 1995, I served the following: **DEFENDANT GREATER BAY AREA ASSOCIATION**

OF PLUMBING AND MECHANICAL CONTRACTORS ANSWER TO UNVERIFIED COMPLAINT on the following in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States Postal Service mail at San Francisco, California addressed as follows:

James A. Carter, Esq.
Brian M. Carter, Esq.
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104

I am readily familiar with the Firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. The envelope(s) above was sealed and placed for collection by the Firm's messengers and will be deposited today with the United States Postal Service in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 27, 1995 at San Francisco, California.

/s/ Gloria M. Dunlap
GLORIA M. DUNLAP

[p. 22] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

JUDGE DEPT. NO. 05
DEPUTY CLERK L. SANDBURG
HONORABLE V. GENE MCDONALD

CASE NO.: 000394184
COURT REPORTER B. GEE

DATE: 05 MAR 1996

TITLE OF ACTION:
MECHANICAL CONTRACTORS ASSOC OF NO CALIF., VS. GREATER BAY AREA ASSOC. OF PLUMBING & MECHANICAL CONTRACTORS, ETC.

NATURE OF EVENTS:
CASE MANAGEMENT CONFERENCE

James A. Carter for Plaintiff APPEARANCE

Daniel Croley for Defendant APPEARANCE

[ ] OFF CALENDAR [ ] NON APPEARANCE BY PARTIES. Shiela Illegible, Illegible

✓ ~~UNREPORTED~~ CONFERENCE HELD ~~IN CHAMBERS~~ WITH ~~THE COURT~~ (AND ABOVE COUNSEL) (~~AND PLAINTIFF/DEFENDANT) (AND~~ ___

___ THIS CASE HAS BEEN DISMISSED. SEE ATTACHMENT.

✓ THIS MATTER IS CONTINUED FOR FURTHER ~~SETTLEMENT~~/CASE MANAGEMENT CONFERENCE IN DEPT. 5 ON June 5, 1996 AT 9:00 A.M./~~P.M.~~

[ ] THIS CASE IS DEEMED AT-ISSUE AND: _____ SENT TO ARBITRATION (JUDICIAL/BINDING); _____ SET FOR TRIAL: _____

[ ] SETTLEMENT CONFERENCE: _____ TO BE ASSIGNED _____ MAY BE ASSIGNED _____ REASSIGNED

[ ] DISMISSAL – ENTIRE ACTION AS TO _____ WAS ENTERED ON _____.

[ ] THE CASE IS EXCEPTED FROM THE CASE MANAGEMENT GUIDELINES BECAUSE: _____

[ ] THIS CASE IS TRANSFERRED TO _____ . _____ TO PAY FOR COSTS OF TRANSFER.

[ ] THIS CASE IS SETTLED FOR _____

[ ] THE CASE IS DESIGNATED AS AN UNINSURED MOTORIST ARBITRATION CASE UNDER CALIFORNIA RULES OF COURT NO. 2103(C) AND CONTINUED TO _____

IN DEPT. _____ AT _ A.M./P.M. FOR REVIEW.

[ ] THIS MATTER IS SET FOR A HEARING ON AN ORDER TO SHOW CAUSE RE: CASE MANAGEMENT CONFERENCE IN DEPT. _____ ON _____

AT _____ A.M./P.M.

[ ] OTHER ORDERS MADE: _____

[ ] LET A WRITTEN ORDER BE PREPARED, SIGNED AND FILED. _____ TO PREPARE ORDER.

DATE: 3-5-96

NATURE OF PROCEEDINGS: _____

CASE MANAGEMENT CONFERENCE MINUTE FOR

_____

[p. 23] GEORGE J. TICHY, II CSB, 941146
JOHN M. SKONBERG, CSB 069409
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
GREATER BAY AREA ASSOCIATION OF
PLUMBING AND MECHANICAL
CONTRACTORS

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION F NORTHERN CALIFORNIA, a CALIFORNIA CORPORATION, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a CALIFORNIA CORPORATION, Defendant.	Case No. 394184 DEFENDANT GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS FIRST AMENDED ANSWER TO UNVERIFIED COMPLAINT (Filed Apr. 19, 1996)

[p. 24] Defendant Greater Bay Area Association of Plumbing and Mechanical Contractors ("Defendant") answers the unverified Complaint of Mechanical Contractors Association of Northern California ("Plaintiff") as follows:

I

GENERAL DENIAL

1. Defendant generally denies each and every allegation of Plaintiff's unverified Complaint.

II

AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to Plaintiff's Complaint, and alleged causes of action, and each of them, Defendant alleges as follows:

FIRST AFFIRMATIVE DEFENSE

1. Plaintiff's Complaint and alleged causes of action and each of them, fail to state facts sufficient to constitute cause of action against Defendant.

SECOND AFFIRMATIVE DEFENSE

2. Plaintiff's claims are preempted in whole or in part by the National Labor Relations Act (the "NLRA"), including without limitation, section 8(d) of the NLRA. 29 U.S.C. § 141, *et seq.*

THIRD AFFIRMATIVE DEFENSE

3. Plaintiff's Complaint and causes of action, and each of them, alleges an agreement which is unlawful under the NLRA including without limitation, section 8(d) of the NLRA; thus, the agreement is void under Civil Code sections 1608 and 1667. 29 U.S.C. § 141, *et seq.*

[p. 25] **FOURTH AFFIRMATIVE DEFENSE**

4. Paintiff's Complaint and causes of action, and each of them, are barred by, or the relief Plaintiff seeks is unavailable under, the principle of Mistake of Fact.

FIFTH AFFIRMATIVE DEFENSE

5. Defendant is informed and believes and thereon alleges that Plaintiff has failed to avoid or minimize any and all damages which are alleged to have been caused by Defendant, and Defendant's liability to Plaintiff, if any, should be denied or reduced accordingly.

SIXTH AFFIRMATIVE DEFENSE

6. Plaintiff's Complaint and causes of action, and each of them, are barred, or the relief Plaintiff seeks is unavailable in whole or in part by Plaintiff's fraudulent misrepresentation and/or omissions.

SEVENTH AFFIRMATIVE DEFENSE

7. Plaintiff's Complaint and causes of action, and each of them are barred by, or the relief which Plaintiff seeks is unavailable under, the doctrine of estoppel.

EIGHTH AFFIRMATIVE DEFENSE

8. Plaintiff's Complaint and causes of action, and each of them, are bared or excused by Plaintiff's failure of performance.

NINTH AFFIRMATIVE DEFENSE

9. Plaintiff's Complaint and alleged causes of action and each of them, fail to state a claim against Defendant because Local 393 and/or Local 467 are not parties to the agreement(s) and/or contract modification(s) alleged.

[p. 26] **TENTH AFFIRMATIVE DEFENSE**

10. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the agreement(s) alleged was not authorized or ratified in whole or in part by Defendant.

ELEVENTH AFFIRMATIVE DEFENSE

11. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the agreement(s) alleged is not supported in whole or in part by adequate consideration.

TWELFTH AFFIRMATIVE DEFENSE

12. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the alleged entry into the alleged agreement(s) is an ultra vires act.

THIRTEENTH AFFIRMATIVE DEFENSE

13. From approximately September 1992, and continuing to the present, Plaintiff has been indebeted to Defendant in an amount to be determined at trial. This indebtedness arose by virtue of contract administration funds which were due to Defendant but were paid to Plaintiff. This whole amount is unpaid and now due and together with interest thereon at the applicable rate, must be set off against any amount awarded to Plaintiff in this action under California Code of Civil Code of Civil Procedure section 431.7 and/or any equitable right of recoupment and/or set off.

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiff take nothing by its Complaint.

2. For its costs incurred herein.

[p. 27] 3. That the amount of Defendant's claim against Plaintiff, together with interest at the applicable rate, be set off against any amount awarded to Plaintiff in this action.

4. For such other and further relief as the Court may deem just and proper.

Dated: April 3, 1996

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
GEORGE J. TICHY, II
JOHN M. SKONBERG
DANIEL A. CROLEY

By: /s/ Daniel A. Croley
DANIEL A CROLEY

Attorneys For Defendant
GREATER BAY AREA
ASSOCIATION
OF PLUMBING AND
MECHANICAL
CONTRACTORS

[p. 28] **PROOF OF SERVICE**

(Filed Apr. 19, 1996)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler, Mendelson, Fastiff, Tichy & Mathiason, 650 California Street, 20th Floor, San Francisco, California 94108-2693. On April 3, 1996, I served the within document(s):

DEFENDANT GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS FIRST AMENDED ANSWER TO UNVERIFIED COMPLAINT

[ ] by facsimile transmission at or about _____ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (415) 399-8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.

[x] by placing a true copy of the document(s) listed above for collection and mailing following the firm's

ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

[ ] by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in a Federal Express pick up box or office designated for overnight delivery, and addressed as set forth below.

[ ] by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

James A. Carter, Esq.
Brian M. Carter, Esq.
CARTER & CARTER
425 California Street
19th Floor
San Francisco, CA 94104

[p. 29] I am readily familiar with the firm's practice of collecting and processing correspondence for mailing and for shipping via Federal Express. Under that practice it would be deposited with the U.S. Postal Service or if a Federal Express shipment, deposited in a Federal Express pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 3, 1996 at San Francisco, California.

/s/ Gloria M. Dunlap
GLORIA M. DUNLAP

[p. 30] **GEORGE J. TICHY, II CSB, 941146**
JOHN M. SKONBERG, CSB 069409
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a CALIFORNIA CORPORATION,	**Case No. 394184**
Plaintiff,	**STIPULATION AND ORDER**
v.	(Filed Apr. 19, 1996)
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a CALIFORNIA CORPORATION,	
Defendant.	

[p. 31] Plaintiff Mechanical Contractors Association of Northern California ("MCA") and Defendant Greater

Bay Area Association of Plumbing and Mechanical Contractors ("GBA") stipulate as follows:

1. GBA will file and serve upon MCA's counsel by mail the FIRST AMENDED ANSWER TO UNVERIFIED COMPLAINT, a copy of which is attached as Exhibit A.

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA

DATED: March 29, 1996 BY: /s/ James Carter
JAMES CARTER

of **CARTER AND CARTER**

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS

DATED: March 25, 1996 BY: /s/ Daniel A. Croley
DANIEL A. CROLEY

of **LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON**
A Professional Corporation

IT IS SO ORDERED based on the parties above-referenced Stipulation.

DATED: APR 18 1996 /s/ Illegible
JUDGE OF THE SUPERIOR COURT

[p. 32] **PROOF OF SERVICE**

(Filed Apr. 19, 1996)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler, Mendelson, Fastiff, Tichy & Mathiason, 650 California Street, 20th Floor, San Francisco, California 94108-2693. On April 3, 1996, I served the within document(s):

STIPULATION AND ORDER

_ by facsimile transmission at or about _____ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (415) 399-8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.

X by placing the true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

_ by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in a Federal Express pick up box or office designated for overnight delivery, and addressed as set forth below.

_ by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

James A. Carter, Esq.
Brian M. Carter, Esq.
CARTER & CARTER
425 California Street
19th Floor
San Francisco, CA 94104

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing and for shipping via [p. 33] Federal Express. Under that practice it would be deposited with the U.S. Postal Service or if a Federal Express shipment, deposited in a Federal Express pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 3, 1996 at San Francisco, California.

/s/ Gloria M. Dunlap
GLORIA M. DUNLAP

[p. 34] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

JUDGE DEPT. NO. 03
DEPUTY CLERK RUTH DEMOSS
HONORABLE ARAM SERVERIAN

CASE NO.: 000394184
COURT REPORTER E. GEE

DATE: 05 JUN 1996

TITLE OF ACTION:
MECHANICAL CONTRACTORS ASSOC OF NO CALIF., VS. GREATER BAY

NATURE OF EVENTS:
CASE MANAGEMENT CONFERENCE ___ (3/5)

Brian Carter for Plaintiff APPEARANCES

Daniel A. Croley for Defendant APPEARANCES

[ ] OFF CALENDAR [ ] NON APPEARANCE BY PARTIES.

___ UNREPORTED CONFERENCE HELD IN CHAMBERS WITH THE COURT (AND ABOVE COUNSEL) (AND PLAINTIFF/DEFENDANT) (AND _____ .

___ THIS CASE HAS BEEN DISMISSED. SEE ATTACHMENT.

___ THIS MATTER IS CONTINUED FOR FURTHER SETTLEMENT/CASE MANAGEMENT CONFERENCE IN DEPT. _____ ON _____ AT _____ A.M./P.M.

✓ THIS CASE IS DEEMED AT-ISSUE AND: _____
SENT TO ARBITRATION (JUDICIAL/BINDING);
✓ SET FOR TRIAL: January 1997

[ ] SETTLEMENT CONFERENCE: [ ] TO BE ASSIGNED [ ] MAY BE ASSIGNED [ ] REASSIGED

[ ] DISMISSAL – ENTIRE ACTION AS TO _____ WAS ENTERED ON _____.

[ ] THE CASE IS EXCEPTED FROM THE CASE MANAGEMENT GUIDELINES BECAUSE: _____

[ ] THIS CASE IS TRANSFERRED TO _____. _____ TO PAY FOR COSTS OF TRANSFER.

[ ] THIS CASE IS SETTLED FOR _____

[ ] THE CASE IS DESIGNATED AS AN UNINSURED MOTORIST ARBITRATION CASE UNDER CALIFORNIA RULES OF COURT NO. 2103(C) AND CONTINUED TO _____

IN DEPT. _____ AT _ A.M./P.M. FOR REVIEW.

[ ] THIS MATTER IS SET FOR A HEARING ON AN ORDER TO SHOW CAUSE RE: CASE MANAGEMENT CONFERENCE IN DEPT. _____ ON _____

AT _____ A.M./P.M.

[ ] OTHER ORDERS MADE: _____

[ ] LET A WRITTEN ORDER BE PREPARED, SIGNED AND FILED. _____ TO PREPARE ORDER.

DATE: June 5, 1996

NATURE OF PROCEEDINGS: _____

CMC CNS

CASE MANAGEMENT CONFERENCE MINUTE FORM

_____

[p. 35] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 INDEX TO DECLARATIONS AND EXHIBITS IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

1. Declaration of Scott Strawbridge 1

A. MCA's Offer Letter to GBA, Exhibit "A"... 6

B. Ron Peterson's Initialized Letter in Response, Exhibit "B" 8

C. GBA's Confirmation to CPMCA, Exhibit "C" 10

D. GBA Board of Directors' Minutes, Exhibit "D" 12

E. GBA's Bank Statement Reflecting Deposit, Exhibit "E" 15

F. Correspondence Between Egan Plumbing and MCA, Exhibit "F" 17

[p. 36] 2. Declaration of James A. Carter 1

A. Correspondence Between GBA Counsel and MCA Counsel, Exhibit "A" 3

3. Declaration of Brian M. Carter 1

A. MCA's Check to GBA 2

B. Relevant Portions of Deposition of Frank Park, Exhibit "B" 3

4. Declaration of Gary Saunders 1

5. Declaration of Loyd Williams 1

[p. 37] **EXHIBIT 1**

[p. 38] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 398184 DECLARATION OF SCOTT STRAWBRIDGE IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

I, SCOTT STRAWBRIDGE, have personal knowledge of the foregoing and, if called as a witness, could and would testify as follows:

1. I am the executive vice-president of Plaintiff MECHANICAL CONTRACTORS ASSOCIATION OF

NORTHERN CALIFORNIA (hereafter "MCA") and held that position at all times relevant herein. MCA is a California corporation doing business as an association of licensed mechanical and plumbing contractors which acts as collective bargaining agent on behalf of its members. MCA's principal place of business is in the County of Contra Costa, State of California.

2. Defendant GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS (hereafter "GBA") is a California corporation doing business as an association of mechanical and plumbing contractors with its principal place of business in [p. 39] the State of California, County of San Mateo.

3. MCA and GBA are competitors, to wit, each acts as bargaining agent for its members in conjunction with the applicable unions for purposes of both the negotiations leading to collective bargaining agreements and the administration of those agreements.

4. Both GBA and MCA are parties to separate collective bargaining agreements (on behalf of their constituent members) with various unions under which both MCA's and GBA's members perform contracting services. Those collective bargaining agreements provide for the payment of contract administration and industry funds ("funds") which are monies earned by the respective associations for all work performed by union members under the collective bargaining agreements to which that association is signatory. Under the provisions of these collective bargaining agreements, "funds" are initially paid by the member contractor to a trust administrator

which then distributes them to the appropriate association.

5. During 1993, certain disputes arose between MCA and GBA concerning the ability of contractor-members to change associations while the applicable collective bargaining agreement remained in force, and the allocation of "funds" paid by those members after they changed associations.

6. Prior to the disputes between MCA and GBA referred to in paragraph 5, *supra*, both MCA and GBA had joined a newly formed statewide association of contractors, the "CPMCA". GBA had contributed $5,000 of "seed money" to CPMCA[1] while MCA had not contributed any "seed money". GBA subsequently changed its mind and decided to withdraw from CPMCA. Because of a shortage of cash, CPMCA was unable to immediately refund GBA's "seed money".

7. In an effort to resolve their disputes and avoid litigation, representatives of MCA (including myself) and GBA (including the President of each association) met in December of 1993. At that meeting, I stated that MCA had a proposal for resolving the disputes which I would put into writing and present for GBA's consideration. By letter dated January 7, 1994, I wrote to [p. 40] GBA's then president (Ron Peterson) and proposed an agreement with GBA whereby: (1) MCA would give GBA $5,000

---

[1] "CPMCA" refers to the California Plumbing and Mechanical Contractors Association, a statewide association of plumbing and mechanical contractors based in Sacramento which is not related, connected or affiliated with either MCA or GBA.

immediately in exchange for an assignment of GBA's right to recoup its "seed money" from CPMCA; (2) the disputes between MCA and GBA were deemed resolved; and (3) to avoid repetitions of the disputes in the future, both associations would agree that their rights to "funds" paid under the relevant collective bargaining agreements be modified by a new agreement which provided that either association's members could switch its affiliation to the other association by giving written notice to both associations, the change to be effective on the anniversary date of the applicable collective bargaining agreement (July 1), and that "funds" which were earned after the effective date of the association change would be paid to the member's new association.

8. While I knew that the modification of a provision in the collective bargaining agreements proposed by MCA's offer would require the consent of the affected unions (who were signatory to those agreements), I had discussed that issue with the two involved unions prior to sending the proposal to GBA. In response to my queries concerning the unions' position on the issue, the business managers for both of the affected unions (Gary Saunders of U.A. Local 467 and Loyd Williams of U.A. Local 393) stated that they did not want to become involved in the disputes between MCA and GBA. Both Saunders and Williams stated to me that their respective unions would accept whatever agreement was reached by MCA and GBA with respect to members who wished to change associations and had no objection to modification of the provision in the collective bargaining agreements which specified the association representing each contractor and the association which was entitled to receive

contract administration funds from each contractor. *See* Declarations of Gary Saunders and Loyd Williams in Support of Motion for Summary Adjudication.

9. After formalizing my idea for resolving the disputes proposal into a written offer (my letter dated January 7, 1994) I mailed that letter, along with a check for the $5,000 made out to GBA, to GBA's President, Ron Peterson. The offer, by its terms, was to be accepted by Peterson initialing the letter (as confirmation of GBA's acceptance of the proposal) after getting authorization from GBA's Board of Directors and/or cashing the enclosed check. The offer also [p. 41] explicitly stated that GBA was to return the check if it did not accept the offer. A true and correct copy of this offer is attached hereto as Exhibit "A".

10. Several days later, Peterson told me by telephone that he would present the offer to GBA's Board of Directors for approval.

11. On or about January 20, 1994, GBA's President Ron Peterson initialed the letter and returned it to MCA, manifesting GBA's acceptance of the offer. A true and correct copy of this letter executed by Ron Petersen as GBA's President, is attached hereto as Exhibit "B".

12. On the same date, GBA sent confirmation to CPMCA that "MCA has taken GBA's position for the 'seed money' " and sent a copy to MCA. A true and correct copy of that notification is attached hereto as Exhibit "C".

13. On or about the same date, GBA also cashed the $5,000 check further confirming its acceptance of MCA's

proposal. In or about the first few months of 1996, Jim Leahy, a member of GBA's Board of Directors, gave me copies of both the minutes of GBA's Board of Directors' meeting wherein the Board voted to accept the $5,000 of "seed money" from MCA and GBA's bank statement showing the deposit of the "seed money" check. Attached hereto as Exhibits "D" and "E", respectively, are true and correct copies of the Board minutes and GBA's check register.

14. Soon thereafter at a legislative conference in Sacramento that I attended, GBA's then Vice-President (Frank Park) independently confirmed the settlement (i.e. GBA's acceptance of MCA's offer) to me personally and expressed his satisfaction that the past problems between our respective associations had been resolved.

15. MCA relied in good faith on the existence of the MCA-GBA agreement by, inter alia: transferring certain fund contributions ($570.38) to GBA when GBA claimed to have provided services for the member even though the affected member (Metro Plumbing) had changed its affiliation to MCA as provided in the agreement, and by allowing Egan Plumbing (in 1995) to change associations from MCA to GBA even though MCA would not have done so in the absence of the MCA-GBA agreement. Attached hereto as Exhibit "F" is a true and correct copy of both Egan's request to transfer to GBA and the cover letter I wrote to Egan (with the request, executed by myself as approved on behalf of MCA, enclosed) explaining that I was agreeing to [p. 42] allow the switch because of GBA's acceptance of the terms of the January 7, 1994 proposal. While MCA generally allows its members to switch to other associations which have allowed their

members to switch to other associations (and/or have otherwise acted in good faith vis-vis MCA, because GBA's lack of good faith in the past MCA would not have allowed its members to switch to GBA in the absence of the MCA-GBA agreement (or some form of agreement that GBA would reciprocate and allow its members to change their association to MCA.)

16. I always intended and understood that the agreement which is at issue in this case applied to the collective bargaining agreements in force at the time the agreement was accepted by GBA. One of the main reasons I proposed that agreement was to resolve the dispute over entitlement to contract administration funds under the then current collective bargaining agreements (from Madlem Mechanical and Thermal Mechanical). At no time during the discussions or negotiations regarding the letter agreement did GBA, or anyone affiliated with GBA, ever state to me that their understanding of the agreement was that it would only apply to future collective bargaining agreements. Further, GBA first asked that the proposed agreement be modified or limited so that it only applied to future collective bargaining agreements after the present dispute had arisen.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 18th day of October, 1996, at Walnut Creek, California.

/s/ Scott W. Strawbridge
Scott Strawbridge

[p. 43] **EXHIBIT A**

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA

940 Adams, Suite F
Benicia, CA 94510
(800) 640-5152
(707) 746-6484
FAX (707) 746-5384

[LOGO] [LOGO]

7 January 1994

Ron Peterson, President
GBA
c/o R. L. Peterson Company
P.O. Box 2267
Menlo Park, CA 94026

Dear Ron:

As a follow up to our December luncheon and subsequent phone calls, MCA would like to offer the following:

* MCA has attached a check for $5,000 made out to GBA.

* GBA may cash if the following is agreed to:

1) GBA writes CPMCA and relinquishes its claim to its *"seed money"* and informs CPMCA that MCA has taken GBA's position for *"seed money."* It will then be up to MCA and CPMCA to work out details as to the disposition of that *"seed money."*

2) The dispute between MCA and GBA is settled concerning the representation and employer trust funds of Madlem Mechanical and Thermal Mechanical.

3) Per our luncheon discussion, MCA would like to establish the following procedure to avoid any future such problems:

> It is agreed between MCA and GBA that no signatory contractors may switch Associations without notifying their respective Associations in writing and that switch (as far as employer trust funds) is made on next the anniversary date of the collective bargaining agreement; i.e., a signatory contractor from MCA who wishes to become signatory with GBA would notify MCA that he wishes to switch in writing. Currently the agreements in Local 467 and Local 393 have an anniversary date of July 1 each year. Hours starting on the next July 1 could be switched to the new Association.

[p. 44] Ron I hope this settlement, without prejudice, is acceptable to GBA. We see it as a win-win situation.

* GBA get its $5,000 seed money back immediately versus waiting for the March CPMCA Board Meeting and then the seed money may only be returned in progress payments.

* The dispute between MCA and GBA is over.

* A procedure for the future is established.

If the above settlement is acceptable, please have the GBA Board authorize you to initial this letter and the check can be cashed. If it is not acceptable, please return the check.

Thank you for your help and please feel free to contact me if you have any questions.

Sincerely,

/s/ Scott
Scott W. Strawbridge
Executive Vice President

SS:nw

Enclosure

cc: MCA Board
Jim Carter

R

[p. 45] **EXHIBIT B**

MECHANICAL
CONTRACTORS
ASSOCIATION
OF NORTHERN
CALIFORNIA

940 Adams, Suite F
Benicia, CA 94510
(800) 640-5152
(707) 746-6484
FAX (707) 746-5384

[LOGO] [LOGO]

7 January 1994

Ron Peterson, President
GBA
c/o R. L. Peterson Company
P.O. Box 2267
Menlo Park, CA 94026

Dear Ron:

As a follow up to our December luncheon and subsequent phone calls, MCA would like to offer the following:

* MCA has attached a check for $5,000 made out to GBA.

* GBA may cash if the following is agreed to:

1) GBA writes CPMCA and relinquishes its claim to its *"seed money"* and informs CPMCA that MCA has taken GBA's position for *"seed money."* It will then be up to MCA and CPMCA to work out details as to the disposition of that *"seed money."*

2) The dispute between MCA and GBA is settled concerning the representation and employer trust funds of Madlem Mechanical and Thermal Mechanical.

3) Per our luncheon discussion, MCA would like to establish the following procedure to avoid any future such problems:

> It is agreed between MCA and GBA that no signatory contractors may switch Associations without notifying their respective Associations in writing and that switch (as far as employer trust funds) is made on next the anniversary date of the collective bargaining agreement; i.e., a signatory contractor from MCA who wishes to become signatory with GBA would notify MCA that he wishes to switch in writing. Currently the agreements in Local 467 and Local 393 have an anniversary date of July 1 each year. Hours starting on the next July 1 could be switched to the new Association.
>
> [p. 46] Ron I hope this settlement, without prejudice, is acceptable to GBA. We see it as a win-win situation.
>
> * GBA get its $5,000 seed money back immediately versus waiting for the March CPMCA Board Meeting and then the seed money may only be returned in progress payments.
>
> * The dispute between MCA and GBA is over.
>
> * A procedure for the future is established.

If the above settlement is acceptable, please have the GBA Board authorize you to initial this letter and the check can be cashed. If it is not acceptable, please return the check.

Thank you for your help and please feel free to contact me if you have any questions.

Sincerely,

/s/ Scott
Scott W. Strawbridge
Executive Vice President

SS:nw

Enclosure

cc: MCA Board
Jim Carter

R

[p. 47] **EXHIBIT C**

[LOGO]
Greater Bay Area Association of
Plumbing and Mechanical Contractors, Inc.

2672 Bayshore Parkway – Suite 531
Mountain View, CA 94043
Telephone: (415) 965-0100 • Fax: (415) 965-0111

January 20, 1994
Elaine J. Rose
CPMCA
50 Fullerton Ct., Ste. 201
Sacramento, CA 95825

Dear Elaine:

GBA would like to relinquish our claim to the "seed money." MCA has taken GBA's position for the "seed money."

We wish you much good luck at CPMCA and look forward to seeing you at the Western Mechanical Conference in March, 1994.

Thank you for the invitation to re-join CPMCA should we once again change our minds.

Sincerely,

/s/ Norma
Norma Y. Singer
Executive Director

NYS:as

cc: Scott Strawbridge
MCA

[p. 48] **Greater Bay Area Association**
of
Plumbing and Mechanical Contractors
Board of Directors Meeting Minutes
Tuesday, February 8, 1994
Mistral's
Redwood City

Present: Ron Peterson, Dave Barr, Frank Park, Claude Bergman, Rich DiMuzio, Jim Leahy, Tony Egan, Rube Sonstegard, Scott Denny, Steve Singewald, Russ Margiotta, Norma Singer.

Absent: Glen Bollenbacher

Minutes: **Motion** was made and passed to accept the minutes as mailed.

Financials:

Motion made and passed to accept the Financial Statement.

Motion made and passed to accept the income and expense statement.

Bills Presented for Payment – Motion was made and passed to pay Bills Presented for Payment.

Kidder, Peabody – Sandy Lanoie will be at the next Board Meeting to go over what we have in our account and what we would like to do.

S.J. Gallina & Co. put the year 1988 on the Financial Statement as the year an amendment was added to the By-Laws. If the Board wishes a correction, it will be made.

Correspondence:

Executive Director Report:

[p. 49] **EXHIBIT D**

Greater Bay Area Association
of
Plumbing and Mechanical Contractors
Board of Directors Meeting Minutes
Tuesday, January 11, 1994
GBA Office
Mt. View

Present: Ron Peterson, Dave Barr, Frank Park, Claude Bergman, Rich DiMuzio, Jim Leahy, Tony Egan, Norma Singer.

Absent: Rube Sonstegard, Glen Bollenbacher, Russ Margiotta, Scott Denny

Minutes: **Motion** was made and passed to accept the minutes as mailed.

Financials:

Motion made and passed to accept the Financial Statement.

Bills Presented for Payment – Motion was made and passed to pay Bills Presented for Payment.

Motion made and passed to accept the Budget as presented.

CLC will get back to Frank with how much they will be charging us.

Motion made and passed to cancel the picnic.

Motion made and passed to transfer $10,000 from Kidder, Peabody to Wells Fargo checking account.

Correspondence:

Letter from Rube thanking GBA for the donation to the Cancer Society and all the many cards that were sent to him.

[p. 50] **Executive Director Report:**

The Board accepted the Executive Directors report as presented.

Old Business:

Jim Leahy suggested we contact Carr, McClellan, Ingersoll, Thompson & Horn concerning changing Attorneys. Jim said the firm is very educated when it comes to the contractors. They are up on all the current laws. They are very efficient! They have a legal team that takes care of the construction end of what we do. Our last retainer for Harband was $2,500.

Motion made and passed to accept MCA's $5,000 check for the "seed money" that CPMCA owes us. If anyone wishes to change associations they can change on the anniversary date of each year.

Norma to fax MCA's letter to all members.

Motion made to accept all the even Board Members that are on the Board. Rube, Claude and Ron are the **only** even people, all the rest are odd. They will remain on the board for one more term.

Norma to check availability and approximate cost of the Plumbed Horse Restaurant in Saratoga for a Dinner Installation.

New Business:

Good of the Association:

Adjournment:

With no other business the meeting was adjourned.

Respectfully submitted,

/s/ Norma Y. Singer
Norma Y. Singer
Executive Director
January 21, 1994

[p. 51] The Board accepted the Executive Directors report as presented. It was requested that more detail be included concerning the phone conversations with the various people.

Old Business:

Peninsula Marine Office Park is the location which we are considering moving the office. Rube Sonstegard volunteered to do the negotiating concerning new office space.

Ron Peterson will send a letter to Scott Strawbridge with a point of clarification concerning switching the Associations.

Russ Margiotta thanked the Board for the flowers that were sent to him while he was in the hospital.

New Business:

Good of the Association:

Scott Denny stated that anyone wishing to be a member of IAPMO (wishing to join as an associate of

this association) can join as a D1. It is cheaper to join as a D1 rather than a C1 (Contractor). You get the same benefits and it is half price ($30 rather than $60.)

Steve Singewald suggested we look toward someone to represent us on outside labor relations that charges a flat fee basis, not geared to revenue generated by hours worked. Steve said he would look into this for GBA.

Adjournment:

With no other business the meeting was adjourned.

Respectfully submitted,

/s/ Norma Y. Singer
Norma Y. Singer
Executive Director
February 24, 1994

[p. 52] **EXHIBIT E**

January 7, 1994 **Page:**

Check Register
From: 1/12/94 To: 2/7/94

Date	Num	Payee/ Memo	Cir	Amount	Balance
Illegible Illegible	1540	ANDREA SANCHEZ PERIOD ENDING 1-15-94	X	-370.33	198.67
Illegible	1541	NORMA Y. SINGER PERIOD ENDING 1-15-94	X	-1,037.35	-838.68
Illegible Deposit		DEPOSIT SEED MONEY FROM MCA	X	5,000.00	4,161.32
Illegible Deposit		DEPOSIT KIDDER, PEABODY	X	10,000.00	14,161.32
Illegible Deposit		DEPOSIT JOHN-DROW, LEV./ ROUNTREE	X	960.00	15,121.32
Illegible Deposit		DEPOSIT PEN SP, MERSCH, SPE PRO, DITTMANN	X	1,920.00	17,041.32

Illegible Deposit		DEPOSIT ADVERTIS-ING TRUST	X	2,000.00	19,041.32
Illegible Deposit		DEPOSIT SIGILLO, S&E, SPEC. PROD.		1,062.00	20,103.32
Illegible Deposit		DEPOSIT DALE, CAL-STEAM		1,005.00	21,108.32
1/31/94 Deposit		DEPOSIT FRANK PARK		51.27	21,159.59
2/1/94 Deposit		DEPOSIT NOVA MECHANI-CAL		51.27	21,210.86
2/1/94 Check	1547	STEPHEN CHELBAY FIDUCIARY INS.		-175.00	21,035.86
2/1/94 Check	1548	PITNEY BOWES POST. BY PHONE 2-16 THRU 5-15		-138.02	20,897.84
2/1/94 Check	1549	PACIFIC BELL JANUARY STATE-MENT		-191.69	20,706.15

2/1/94 Check	1550	SHORELINE PARK OFFICE PLAZA FEBRUARY RENT	-560.00	20,146.15
2/1/94 Check	1551	VOID	.00	20,146.15
2/2/94	1552	PHCC	-594.00	19,552.15

[p. 53] ***Egan Plumbing***

---

725 Industrial Rd. San Carlos, CA 94070 (415) 592-0472
FAX (415) 592-4768

May 16, 1995

Residential Plumbing & Mechanical Contractors
of Northern California
No. California MCA
1901 Olympic Blvd., Ste 200
Walnut Creek, Ca 94596
510-945-1288
Attn: Mr. Scott Strawbridge
Exec. Vice-President-MCA Assoc. of No. California

Dear Scott,

This letter is an official notification that EGAN PLUMBING wishes to resign from RPMC and/or and including (No. California MCA) and withdraws its bargaining rights from the association effective July 1, 1995.

It is my understanding that Egan Plumbing will not be bound by any future bargaining agreements by RPMC as a seperate entity or as part of the merged No. California MCA.

Please be further notified that Egan Plumbing wishes to transfer its bargaining rights to the Greater Bay Area Association effective July 1, 1995 and is in full understanding that the Hours starting on July 1, 1995 will be transfered to the new association. (GBA) SWS

The undersigned recognizes and agrees that he has been properly notified of the intentions of Egan Plumbing to switch associations, and that hours for Egan Plumbing will transfer to GBA Association beginning July 1, 1995.

Please indicate your acceptance by signing, dating and returning this letter to me within ten (10) days.

Sincerely,

/s/ Anthony J. Egan
Anthony J. Egan
Egan Plumbing

Accepted:

/s/ Scott W Strawbridge Date 5-17-95
Scott Strawbridge

[p. 54] **EXHIBIT F**

MCA NORTHERN CALIFORNIA MECHANICAL
CONTRACTORS ASSOCIATION

May 18, 1995

Anthony Egan
Egan Plumbing
725 Industrial Road
San Carlos, CA 94070

Dear Tony:

Thank you for your letter of May 16, 1995, concerning switching from RPMC to GBA.

Pursuant to my letter of January 7, 1994 (attached), which was signed off and approved by then GBA President Ron Peterson, I am signing your attached letter.

Good luck in GBA and I know you will be an outstanding GBA Board member.

Sincerely,
/s/ Scott
Scott W. Strawbridge
Executive Vice President

SS:nw

cc: Barbara Cunningham
Gary Saunders

[Letterhead Omitted In Printing]

[p. 55] **EXHIBIT 2**

[p. 56] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 DECLARATION OF JAMES A. CARTER IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

I, JAMES A CARTER, declare:

1. I am an attorney at law duly licensed to practice before all the courts of the State of California and am a partner in Carter & Carter, counsel for plaintiff herein.

2. In 1993, I represented plaintiff in connection with a dispute with defendant concerning the legal right and authority of contractors who were signatory to the Master Agreement between defendant GBA and U.A. Local Unions 393 and 467 to change their bargaining rights to plaintiff MCA and to thereby cause their contract administration and other employer funds to be directed to MCA rather than GBA. Two contractors, Thermal Mechanical and Madlem Mechanical, had been signatory to the GBA Master Agreement and wished to transfer to the MCA Master Agreement. I advised that said contractors had the authority to transfer with the consent of the Local Unions, even if GBA objected to said transfers. Legal counsel for GBA (Martin Harband) [p. 57] took an opposite view, and I engaged in correspondence with said legal counsel concerning our respective legal interpretations. True and correct copies of relevant portions of that correspondence are attached hereto as Exhibit "A".

3. Those letters demonstrate that the dispute between plaintiff and defendant concerned the then-current Collective Bargaining Agreements between GBA and Local Unions 393 and 467 and the authority of contractors bound by the GBA agreements to transfer to the MCA agreements. The "Letter Agreement" was intended to resolve the then current dispute (involving Madlem and Thermal) and to eliminate the threat of litigation between plaintiff and defendant concerning the contributions paid by Thermal and Madlem up to that time, as well as their future contributions paid by those contractors. Accordingly, the Letter Agreement, if it were to resolve that dispute, necessarily involved rights under the then-current Collective Bargaining Agreement. At no time in any

of the correspondence did counsel for GBA ever advise MCA that GBA would agree to application of the right to transfer in the future but would not agree to allow any contractors to transfer to MCA under the then-current Master Agreements.

4. Based upon the Letter Agreement, funds paid previously and paid thereafter by Thermal and Madlem were received by MCA without objection from GBA. It was only when other contractors attempted to transfer to MCA that GBA objected and thereafter took the position that the Letter Agreement applied only to future Collective Bargaining Agreements.

5. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 28th day of September, 1996, at San Francisco, California.

/s/ James A. Carter
James A. Carter

[p. 58] Law Offices Of
GREENE, CHAUVEL & DESCALSO
A Professional Corporation

[Letterhead Omitted In Printing]

March 2, 1993

Plumbers and Steamfitters Local
Union 393
370 Umbarger Road
San Jose, CA 95111

RE: Master Labor Agreement Between
Local 393 and PHCC/GBA
Effective: 7/01/83
Expires: 6/30/95

We represent Plumbing, Heating and Cooling Contractors of the Greater Bay Area ("PHCC/GBA") for the Trustees of the PHCC/GBA Contract Administration Fund.

The Contract Administration Fund ("CAF") was established by the Master Agreement at Article XXVIII, commencing at Paragraph 181, with contributions from each Individual Contractor "for each hour worked by each of its employees upon work covered by the Agreement."

We are advised that CAF funds contributed by MADLEM PLUMBING COMPANY AND THERMAL MECHANICAL have been withheld ("frozen") by Local 393 and not remitted to PHCC/GBA. We require an accounting of such funds and their remittance before March 15, 1993.

Each Individual Contractor is bound to the Master Agreement until June 30, 1995. Membership in PHCC/GBA is not a precondition thereof. CAF funds cannot be withheld by either the Individual Contractor or Union Local 393. The Master Agreement is quite clear: contributions by Individual Contractors for the CAF must be paid to over to the fund.

[p. 59] Kindly indicate to us in advance whether the required accounting and remittance will be available by March 15, 1993. Thank you.

Very truly yours,

/s/ Martin E. Harband
MARTIN E. HARBAND

MEH: ps

[p. 60] HENDRICKSON HIGBIE & CARTER
ATTORNEYS AT LAW
425 CALIFORNIA STREET
NINETEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

[Letterhead Omitted In Printing]

April 16, 1993

Martin E. Harband
Green Chauvel & Descalso
901 Mariner's Island Blvd., Suite 400
San Mateo, California 94404-1594

Re: GBA – MCA – Local 393

Dear Mr. Harband:

I have received a copy of your letter of March 2, 1993, to UA Local 393, and I have been asked by MCA to give an opinion letter concerning the dispute between GBA and MCA.

I enclose herewith a copy of my letter to MCA dated April 16, 1993 for your review and analysis.

After you have reviewed this letter I request you give me a call in order that we may discuss a resolution of this dispute without further involvement of Local 393.

Very truly yours,

HENDRICKSON, HIGBIE
& CARTER

/s/ James A. Carter
James A. Carter

JAC/ea
Enclosure

cc: Robert Jesinger (w/encls.)
Attorney for Local 393

Scott Strawbridge

[p. 61] HENDRICKSON HIGBIE & CARTER
ATTORNEYS AT LAW
425 CALIFORNIA STREET
NINETEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

[Letterhead Omitted In Printing]

April 16, 1993

Scott Strawbridge
Mechanical Contractors Association
940 Adams, Suite F
Benicia, CA 94510

Re: UA Local 393
Right of Contractors to Change Bargaining Representative During Term of Collective Bargaining Agreement

Dear Scott:

You have advised me that a dispute has arisen concerning the legal authority of contractors who belong to an Employer Association ("GBA") to resign from that Association, designate MCA as the new bargaining representative, and thereafter to modify their collective bargaining agreements ("CBA") between said contractors and UA Local 393. The change would be a mid-term modification in order to designate MCA, rather than GBA, as the contractor's bargaining representative and recipient of funds provided in the CBA to be paid for purposes of contract administration.

It is my opinion that, in the absence of a provision in the CBA between GBA and Local 393 which prohibits the substitution of Employer bargaining representative during the term of said CBA, that the signatory employer and Local 393 are legally authorized to amend said CBA

to designate a new bargaining representative and to authorize said representative to receive contract administration funds. Since there is no restriction in the CBA prohibiting designation of a different employer bargaining representative, and mid-term amendments are specifically authorized in Article XXIX.C, contractors previously represented by GBA may lawfully designate MCA and, effective as of acceptance of that designation by Local 393, said contract administration funds may be paid to MCA.

Although the precise legal basis on which GBA might object to such substitution of employer bargaining representative has not be articulated, we are in receipt of the letter from GBA's counsel dated March 2, 1993, in which it is asserted that the "Master Agreement" requires that contract administration funds be [p. 62] paid to GBA. However, said letter does address the right of modification.

Under any applicable law, whether Federal or California, the law is clear that parties to a contract providing benefits to a third party beneficiary may change, modify or rescind that contract unless the beneficiary has materially changed position in justifiable reliance on the contract before receiving notification of termination or recision. This principle is stated in *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 9th Cir. (1985), interpreting and applying California law to a question arising under a CBA. Moreover, the principle adopted in the *Karo* case was also supported by the Restatement of Contracts, so that legal principle is universal in the United States.

There could be no basis on which GBA could have materially changed its position in reliance on the continued CBAs between its members and Local 393, because GBA would have had no reasonable assurance that any of those contractors would continue to work in 393 jurisdiction, or that GBA would receive any guaranteed minimum income from those CBAs.

Based upon the foregoing analysis it is my opinion that no provision of law protecting third party beneficiaries of contracts would prohibit contractors previously represented by GBA from transferring that representation to MCA, amending the CBAs with Local 393, and thereafter causing contract administration funds to be paid to MCA.

GBA's attorney has not relied on its own by-laws as prohibiting such a transfer of bargaining rights, and there would be no meritorious basis for any such contention. There is no provision in the GBA By-laws prohibiting a member from transferring bargaining rights during the term of the CBA. The GBA By-Laws provide that a Member may resign under procedures set forth therein, which resignation shall be effective if the Member is not delinquent in dues and assessments. It is my understanding that the foregoing requirements have been satisfied by both Madlem and Therma, the two former GBA members who have transferred bargaining rights to MCA.

The GBA By-Laws in section 5.06 provide that, upon resignation of a Member, said Member agrees to "adhere to the terms and conditions of any and all contracts entered into on behalf of the members . . . including

. . . labor contracts or collectively bargained agreements. . . . "

[p. 63] Since the By-Laws are deemed to be a contract between the Member and the Association, the foregoing provision makes the Union a third party beneficiary of that contract. However, since the resigning Members will remain parties to a CBA with Local 393, and since Local 393 does not object to that change in bargaining representatives, its third party rights would not be affected by a modification to MCA's CBA.

Similarly, although the By-Laws require Members upon resigning to adhere to the terms of CBAs previously negotiated by GBA and Unions, that By-Law would not preclude a subsequent modification or amendment of the CBA by mutual agreement of the resigned Member and Union. In this field, Federal Law governs CBAs, but that law would look to California law, which provides quite clearly that:

> "A contract in writing may be modified by a contract in writing." (CC 1698(a)).

Thus, the By-Law provision would not preclude subsequent modification or amendment of the CBA by the resigned member and Local 393.

The only other potential argument which could be raised in objecting to a transfer of bargaining rights might assert a violation of the NLRA. GBA might contend that such conduct constituted an unfair labor practice since it would impact on a multi-employer bargaining unit ("M-E unit"). However, I have reviewed the law regarding multi-employer bargaining as developed by the NLRB and the Federal Courts, and I can find no case which

would even arguably prohibit a member of such an M-E unit from transferring to a different M-E unit, with Union consent, during the term of a CBA. Moreover, the underlying rationale for the encouragement of M-E units would not be violated by the factual circumstances described above. M-E units are designed primarily to negotiate contracts, and both employers and unions are prohibited from conduct which would cause a break-up of such a M-E unit during the negotiating process. However, once the negotiating process has produced an agreement, there would appear to be no labor policy objective which would prohibit a contractor from transferring from one unit to another through a change in designated bargaining representatives. In fact, one of the principles of labor law is to encourage and protect freedom to designate a bargaining representative. Accordingly, any impediments which GBA might attempt to impose against such exercise of choice would appear to be counter to the underlying objectives of Federal Labor Law.

[p. 64] In summary, I do not believe GBA could institute meritorious proceedings either in court or before the NLRB in order to preclude contractors from transferring their bargaining rights from GBA to MCA. Under its bargaining authorization, in my opinion, MCA lawfully may ask Local 393 to modify its CBA and to permit

Contract Administration Funds from said contractors to be paid to MCA under its CBA with Local 393.

Very truly yours,

HENDRICKSON, HIGBIE & CARTER

/s/ James A. Carter
James A. Carter

JAC/ea

[p. 65] LAW OFFICES OF
GREENE, CHAUVEL & DESCALSO
A PROFESSIONAL CORPORATION

[Letterhead Omitted In Printing]

August 5, 1993

Mechanical Contractors Association
of Northern California
940 Adams, Suite F
Benicia, CA 94510

Attention: Scott Strawbridge

RE: Master Labor Agreement between U.A. Local 393 and PHCC/GBA
Our Client: PHCC/GBA

Gentlemen:

We represent the Greater Bay Area Association of Plumbing and Mechanical Contractors, Inc., the successor organization to PHCC/GBA.

We understand that MCA has solicited and secured "signed authorizations" from Thermal Mechanical and Madlem Plumbing Company with respect to collective bargaining representation with U.A. Local 393. Further, that such authorizations have been delivered to Local 393 and United Administrative Services with the request that (i) MCA be recognized as each contractor's representative; and (ii) the Contract Administration Fund contributions from each contractor be paid over to MCA.

As you are well aware, both Thermal Mechanical and Madlem Plumbing Company are signatories to the Master Labor Agreement between PHCC/GBA and U.A. Local

393. The existing GBA authorization executed by each contractor acknowledges that:

> If the Individual Employer should withdraw this authorization, he will still be bound by all Collective Bargaining Agreements in force and effect with Local Unions.

[p. 66] We make no comment on the contractor's decision to join the MCA trade association. Trade association membership is separate and distinct from representation.

Notwithstanding, every contractor who is a party to the multi-employer agreement negotiated by PHCC/GBA and U.A. Local 393 is bound thereto until the expiration date of such agreement. Your continuing efforts to inveigle, entice and encourage contractors to sign MCA representation authorizations – with full knowledge that such contractors are bound to the existing multi-employer agreement negotiated by PHCC/GBA and Local 393 – is clear and unambiguous tortious conduct, commonly known as interference with contractual relations.

We have copies of correspondence between you and APMC of Sacramento which indicate your efforts in 1991 to secure representation authorizations from APMC members then-bound to their multi-employer agreement negotiated by AMPC and Local 447. Your present course of conduct is identical. Your motives and *modus operandi* are exemplified by the repetition of such conduct, and are equally egregious and unlawful.

You are admonished to desist from any further solicitation of GBA signatories, and to disclaim any MCA

authorization from Thermal and Madlem which attempts to breach the multi-employer agreement between PHCC/GBA and U.A. Local 393. Our client has directed us to initiate litigation if you persist.

Very truly yours,

/s/ Martin E. Harband
MARTIN E. HARBAND

MEH:ps
cc: Thermal Mechanical
Madlem Plumbing

[p. 67] HENDRICKSON HIGBIE & CARTER
ATTORNEYS AT LAW
425 CALIFORNIA STREET
NINETEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

[Letterhead Omitted In Printing]

August 10, 1993

VIA FACSIMILE TRANSMITTAL

Martin E. Harband
Green Chauvel & Descalso
901 Mariner's Island Blvd., Suite 400
San Mateo, CA 94404-1594

Re: GBA – MCA – Local 393

Dear Mr. Harband:

Your letter of August 5, 1993 to Mechanical Contractors Association has been referred to the undersigned.

I will reply to your letter within the next ten days.

Very truly yours,

HENDERSON, HIGBIE
& CARTER

/s/ James A. Carter
James A. Carter

JAC/alm

cc: Scott Strawbridge

[p. 68] HENDRICKSON HIGBIE & CARTER
ATTORNEYS AT LAW
425 CALIFORNIA STREET
NINETEENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

[Letterhead Omitted In Printing]

August 19, 1993

VIA FACSIMILE

Martin E. Harband, Esq.
Greene, Chauvel & Descalso
901 Mariner's Island Blvd., Suite 400
San Mateo, CA 94404-1594

Re: GBA – MCA – Local 393

Dear Mr. Harband:

In a letter dated August 10, I advised that I would reply to your letter of August fifth to MCA within ten days. I am not yet in a position to give you a definitive reply, but do wish to give you a preliminary response in order that you may engage in conduct, investigation and analysis in the most productive fashion.

1. You purport to "understand" that MCA has solicited members of GBA, and on that basis, assert that MCA has engaged in tortious interference with contractual relations. Specifically, you accuse MCA of such improper solicitation of Thermal Mechanical and Madlem Plumbing, and you forwarded a copy of your letter to each of these contractors.

2. Contrary to your assertions, I am advised by both Thermal and Madlem that they were not "solicited" by

MCA. Rather, each of them became completely dissatisfied with the services provided by GBA and determined that they wished to be represented by an association which could provide more effective representation in dealing with their signatory labor unions, including Local 393. Accordingly, each of those contractors specifically requested that MCA undertake their representation; they were not "solicited" by MCA. I am in the process of obtaining written confirmation of those facts from those two contractors, and will furnish you copies of their own letters which demonstrate that your factual premise is erroneous and that there has been no tortious interference with your client.

3. You and your client have been aware for some time that the reason Thermal and Madlem resigned from GBA and asked to be represented by MCA was because of dissatisfaction with GBA's services, and not because of improper solicitation. Nevertheless, you and your client have continued to demand that GBA receive Contract Administration Funds paid by former members who became so dissatisfied that they resigned their membership and asked that those funds be paid to an association which they believed provided more effective representation.

[p. 69] 4. Your entire course of action appears to be based on legally unsupported threats, rather than legal analysis asserting rights based upon existing facts. I am advised that you have threatened Local 393 with lawsuits, NLRB proceedings, and arbitration demands; you have threatened MCA with litigation based upon a factual premise which your client knows to be erroneous, and rather than await my promised response to your

letter to MCA, by letter dated August 17, you threatened United Administrative Services even though its only "offense" was remitting funds paid by Madlem and Thermal as specifically requested by those two contractors and as approved by MCA and Local 393. Moreover, your letter to UAS dated August 17, quite aside from being totally lacking in factual or legal justification, also appears to implicitly threaten criminal charges, and may constitute unprofessional conduct in violation of Rule 5-100(A) of the California Rules of Professional Conduct.

I strongly urge you, and your client, to cease your program of threats and attempted intimidation pending a more detailed response from the undersigned. If your client rejects that sound advice, and directs you to institute litigation, I would then strongly urge you to advise your client as to its potential liability for malicious prosecution.

I expect to furnish you a detailed response to your letter to MCA not later than August 31, 1993. It is also my hope and expectation, prior to that time, to have carefully investigated contractual relationship between all parties

and UAS, in order that I may comment on that relationship in the same letter.

Very truly yours,

HENDRICKSON, HIGBIE & CARTER

/s/ James A. Carter
James A. Carter

JAC/mq

cc: MCA
UAS
Madlem Plumbing
Thermal Mechanical
Robert Jesinger

[p. 70] **EXHIBIT 3**

[p. 71] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800
Facsimile: (415) 989-4864

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 398184 DECLARATION OF BRIAN M. CARTER IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

I, BRIAN M. CARTER, declare:

1. I am an attorney at law duly licensed to practice before all the courts of the State of California and am a partner in Carter & Carter, counsel for plaintiff herein.

2. Attached hereto as Exhibit "A" is a true and correct copy of the check representing the $5,000 "seed money", produced by GBA in response to discovery requests and marked by defense counsel as document #D000056.

3. Attached hereto as Exhibit "B" is a true and correct copy of the relevant excerpts from the deposition of Frank Park, GBA's President.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 25st day of October, 1996, at San Francisco, California.

/s/ Brian M. Carter
Brian M. Carter

[p. 72] EXHIBIT A

MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA
1-800-640-5152
940 ADAMS ST., STE. F
BENICIA, CA 94510

1369

11-35
1210

Jan 10 19 93

PAY TO THE ORDER OF GBA $ 5,000.00

Five Thousand Dollars DOLLAR

Bank of America (707) 746-8200
Benicia Branch 0106
70 Solano Square
Benicia, CA 94510

FOR Replaces GBA's seed money for CPMCA

⑈001369⑈ ⑆121000358⑆ 01053⑈03600⑈

DEPOSIT TICKET

DATE 1-12-94

ADDRESS

CURRENCY		
COIN		
CHECKS	11-35	5,000

OLD STANFORD FARM OFFICE
WELLS FARGO BANK
600 QUARRY ROAD, PALO ALTO, CA 94304

PLUMBING - HEATING - COOLING CONTRACTORS
ASSOCIATION OF THE GREATER BAY AREA, INC.

TOTAL ITEMS 1

TOTAL DEPOSIT 5,000 —

⑆121000248⑆0283 01260⑈

D000056

[p. 73] **EXHIBIT B**

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a CALIFORNIA CORPORATION,

PLAINTIFF,

VS. No. 394184

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a CALIFORNIA CORPORATION,

DEFENDANT.

_____/

DEPOSITION OF FRANK PARK

MAY 15, 1996

REPORTED BY: Kathryn Lloyd, CSR #5955

[p. 75] that January 1994 meeting, adopting resolutions that changed the resolutions adopted at that January 1994 meeting.

MR. CROLEY: I don't know if he can answer that question. You used the word "resolution" about three times.

MR. CARTER: Read it back please, Kathy.

(Record read.)

MR. CARTER: That is understandable.

(Record read.)

MR. CROLEY: I have an idea. Why don't you define what you mean by "resolution".

MR. CARTER: Q. As president of the association, you understand the board acts by adopting resolutions; don't you?

A. Right.

MR. CROLEY: Did the board ever subsequently act to change the minutes as reflected in Exhibit B? That seems to be what you are trying to ask.

MR. CARTER: Right.

THE WITNESS: No.

MR. CARTER: Q. Never did?

A. No.

Q. Did you learn at some point that MCA took the position that Exhibit A was an agreement between MCA [p. 74] and GBA?

A. I would say yes.

Q. After learning that MCA took the position that Exhibit A was an agreement, did the board ever act to terminate or change or repudiate what MCA believed was an agreement?

THE WITNESS: I need to talk.

MR. CROLEY: Can we take one minute?

MR. CARTER: Sure.

(Discussion off the record.)

THE WITNESS: In answer to your question, yes.

MR. CARTER: Q. And when did the board take that action?

A. We did it – basically, I took that action yesterday.

Q. Yesterday?

A. Yes.

Q. And you say you took the action as president?

A. As president.

Q. What action did you take?

A. I sent a certified letter to Mr. Strawbridge stating basically that if he is correct, that if it is an agreement, if it is an agreement, we hereby terminate.

[p. 76] **EXHIBIT 4**

[p. 77] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
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425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 DECLARATION OF GARY SAUNDERS

1. I am the Business Manager of U.A. Local 467, which has jurisdiction in San Mateo County, California.

2. I was a Business Agent during the period 1/80 to 12/87 and have been Business Manager since 1/1/88. At all times while acting as a Business Agent and Business

Manager I have been involved in negotiations with employers and employer associations. While acting as Business Manager I have been responsible for negotiating and administering labor agreements between Local 467 and employers and employer associations, including the Master Labor Agreement between Local 467 and Mechanical Contractors Association of Northern California ("MCA") and the Master Labor Agreement between Local 467 and Greater Bay Area [p. 78] Association of Plumbing and Mechanical Contractors ("GBA").

3. At all times while I have been Business Manager it has been the policy of this Local Union that: (A) If a contractor who is signatory to our Master Labor Agreement with either MCA or GBA wishes to transfer its designation of bargaining representative to the other association and become covered by the Master Labor Agreement of the transferee association, such a transfer will be accepted by Local 467 so long as it is specified in writing by the contractor and approved by both MCA and GBA; (B) It has never been the policy of this Union that we wish to negotiate or bargain regarding such a transfer of a signatory employer from one association to the other, nor has this Local Union ever stated that it would need to approve any such transfer in writing.

4. Officers and representatives of both MCA and GBA have been advised of the policy set forth in paragraph 3 above. Pursuant to that policy, Local 467 has accepted the transfers of signatory contractors from one association to the other.

5. It has also been understood and accepted by this Local Union that upon the transfer of an employer from

one Master Labor Agreement to another, that the employer's contract administration contributions as provided in the Master Labor Agreement are automatically assigned and, upon the effective date of said change, the contract administration funds commence being paid under the successor or transferee Master Labor Agreement to the association specified in that Agreement.

6. In 1995 I became aware that two contractors, Design Mechanical and R.L. Peterson, had executed documents indicating a desire to transfer their representation and coverage from GBA to MCA, and I was shown a letter dated January 7, 1994, which appeared to constitute an Agreement by GBA that said transfer would be accepted. However, I was thereafter advised by the officers of GBA that said letter did not constitute a binding agreement and that GBA had not agreed to any such transfer. Accordingly, based upon the policy described above, I advised the contract administrator, UAS, that it should continue paying contract administration funds on those two contractors to GBA since I had been advised by GBA that it had not agreed to the transfer of those contractors to MCA.

[p. 79] 7. If it is determined by a court that GBA had lawfully agreed with MCA that signatory employers covered by the GBA Master Labor Agreement could elect to transfer to the MCA Master Labor Agreement, then it would be the position of this Union that, as of the effective date of the contractors' attempt to change to the MCA Master Labor Agreement, contract administration funds thereafter paid by Design Mechanical and R.L. Peterson were properly payable to MCA, and it would be entitled to collect those funds from GBA since those

funds were paid to GBA on my directions on the mistaken understanding that there was no legally binding agreement between GBA and MCA authorizing the transfer of said contractors and contract administration funds to MCA.

8. I have reviewed a letter on the letterhead of Roundtree Plumbing dated May 9, 1995, and in particular the phrase that: " . . . over the years when we were stalemated in negotiations with Local 467, the Union contended that if GBA did not agree, they could always get Scott Strawbridge to sign, . . . "

9. I have been an active participant in all negotiations between U.A. Local 467 and GBA since 1/1/80. While I was Business Manager I have never made a statement such as that quoted in paragraph 8 above, and while attending negotiations in my capacity as a Business Agent, I never heard the Business Manager make any such statement. Moreover, while I have been participating in negotiations, no representative of Local 467 having any authority to speak for said Local Union has ever made such a statement.

10. Said letter of May 9, 1995, also provides in part: " . . . It is Local 467's position that an agreement is an agreement until July 1998 and unless GBA releases the contractor, he will remain with GBA for the term of the agreement." I have made statements substantially as set forth in that quoted language. I believe the Local 467 policy as described in paragraph 3 above is consistent with that statement. The Master Labor Agreement between Local 467 and GBA does expire, by its terms, in July 1998, and I have stated the policy of this Union that

upon expiration a contractor may designate a new bargaining agent without the approval of the old bargaining agent. However, while a contractor is signatory to and bound by a Master Labor Agreement, the contractor may not be released from that Master Labor Agreement to become signatory to a new [p. 80] Master Labor Agreement without the agreement of both the old and new association. I believe that policy is effectively stated in the language quoted above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and if called as a witness, I could and would competently testify thereto.

Executed on this 7th day of June, 1996, at Burlingame, California

/s/ Gary Saunders
Gary Saunders

[p. 81] **EXHIBIT 5**

[p. 82] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
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425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 DECLARATION OF LOYD WILLIAMS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION

I, LOYD WILLIAMS have personal knowledge of the following and if called as a witness could and would testify as follows:

1. I am the Business Manager of U.A. Local 393, which has jurisdiction in Santa Clara and San Benito Counties, California.

2. I have been Business Manager since March of 1992 and before that I had been a member of the Union Negotiating Committee since 1968. At all times while acting as Business Manager I have been involved in negotiations with employers and employer associations. While acting as Business Manager I have been responsible for negotiating and administering labor [p. 83] agreements between Local 393 and employers and employer associations, including the Master Labor Agreement between Local 393 and Mechanical Contractors Association of Northern California ("MCA") and the Master Labor Agreement between Local 393 and Greater Bay Area Association of Plumbing and Mechanical Contractors ("GBA").

3. At all times while I have been Business Manager it has been the policy of this Local Union that: (A) If a contractor who is signatory to our Master Labor Agreement with either MCA or GBA wishes to transfer its designation of bargaining representative to the other association and become covered by the Master Labor Agreement of the transferee association, such a transfer will be accepted by Local 393 so long as it is specified in writing by the contractor; (B) It has never been the policy of this Union that we wish to negotiate or bargain regarding such a transfer of a signatory employer from one association to the other, nor has this Local Union ever stated that it would need to approve any such transfer in writing. We have always agreed with this process because

the labor agreements are identical, except for the payee of the contract administration funds.

4. Officers and representatives of both MCA and GBA have been advised of the policy set forth in paragraph 3 above. Pursuant to that policy, Local 393 has accepted the transfers of signatory contractors from one association to the other.

5. It has also been understood and accepted by this Local Union that upon the transfer of an employer from one Master Labor Agreement to another, that the employer's contract administration contributions as provided in the Master Labor Agreement are automatically assigned and, upon the effective date of said change, the contract administration funds commence being paid under the successor or transferee Master Labor Agreement to the association specified in that Agreement.

6. In 1995 I became aware that two contractors, Design Mechanical and R.L. Peterson, had executed documents indicating a desire to transfer their representation and coverage from GBA to MCA, and I was shown a letter dated January 7, 1994, which appeared to constitute an Agreement by GBA that said transfer would be accepted. However, I was thereafter advised by the officers of GBA that said letter did not constitute a binding agreement and that GBA had not [p. 84] agreed to any such transfer.

7. If it is determined by a court that GBA had lawfully agreed with MCA that signatory employers covered by the GBA Master Labor Agreement could elect to transfer to the MCA Master Labor Agreement, then it would be the position of this Union that, as of the effective date

of the contractors' attempt to change to the MCA Master Labor Agreement, contract administration funds thereafter paid by Design Mechanical and R.L. Peterson (or any other contractor) were properly payable to MCA, and it would be entitled to reimbursement of any such funds thereafter paid to GBA on the mistaken legal understanding that there was no legally binding agreement between GBA and MCA authorizing the transfer of said contractors and contract administration funds to MCA.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and if called as a witness, I could and would competently testify thereto.

Executed on this 3 day of September, 1996, at San Jose, California.

/s/ Loyd Williams
Loyd Williams

[p. 85] **PROOF OF SERVICE BY HAND DELIVERY (VIA MESSENGER)**

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is: 425 California Street, 19th Floor, San Francisco, California 94104.

On October 28, 1995 I served the attached:

1. NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION
2. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
3. SEPARATE STATEMENT OF ISSUES AS TO WHICH THERE IS NO SUBSTANTIAL CONTROVERSY, ASSOCIATED FACTS AND REFERENCE TO SUPPORTING EVIDENCE
4. DECLARATION OF JAMES A. CARTER IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
5. DECLARATION OF LOYD WILLIAMS IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
6. DECLARATION OF GARY SAUNDERS IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
7. DECLARATION OF SCOTT STRAWBRIDGE IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
8. DECLARATION OF BRIAN CARTER IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

On the interested parties in the within action by personally delivering (via messenger) a true copy thereof at the following address:

Mr. Daniel Croley
Littler, Mendelsohn, et al.,
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 28, 1996.

/s/ Brian M. Carter
Brian M. Carter

[p. 86] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

JUDGE DEPT. NO.
DEPUTY CLERK
[ILLEGIBLE]

CASE NO. 394184
COURT REPORTER

DATE 27 NOV 1996

TITLE OF ACTION:
MECHANICAL CONTRACTORS ASSOC OF NO CALIF., VS. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, ETC

NATURE OF EVENTS:
PLTF. MOTION FOR SUMMARY ADJUDICATION

_____ _____ APPEARANCES

_____ _____ APPEARANCES

___ OFF CALENDAR _____ MOVING PARTY'S REQUEST _____ NONAPPEARANCE _____ STIPULATE

✓ THE ABOVE MATTER IS CONTINUED ASSIGNED TO [ILLEGIBLE] .

___ SUBMITTED ON POINTS AND AUTHORITIES WITHOUT ARGUMENT.

___ MATTER ARGUED BY COUNSEL AND SUBMITTED.

___ MOTION GRANTED _____ MOTION DENIED

___ DEMURRER _____ SUSTAINED _____ DAYS TO AMEND.

_____ OVERRULED _____ DAYS TO ANSWER.

_____ GROUNDS _____

___ THE ABOVE MATTER IS TAKEN UNDER SUBMISSION.

___ POINTS AND AUTHORITIES TO BE SUBMITTED BY _____ NO

LATER THAN _____ AND BY _____ NO

LATER THAN _____

___ NOTICE OF RULING IS _____ WAIVED IN OPEN COURT.

___ _____

___ LET A WRITTEN ORDER BE PREPARED, SIGNED AND FILED.

DATE: 11/21/96

NATURE OF PROCEEDINGS: _____

LAW AND MOTION MINUTE FORM

[p. 87] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

JUDGE DEPT. NO. 8
DEPUTY CLERK Jennifer Illegible
Hon. Mark Illegible

CASE NO. 394184
COURT REPORTER Eric Throne

DATE 10 DEC 1996

TITLE OF ACTION:
MECHANICAL CONTRACTORS ASSOC OF NO CALIF., VS. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, ETC

NATURE OF EVENTS:

01.PLTF. MOTION FOR SUMMARY ADJUDICATION ___ (11-27)

02.DEFT. PLUMBING-HEARING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC'S CROSS-MOT FOR SUMMARY ADJUDICATION

_____ _____ APPEARANCES

_____ _____ APPEARANCES

___ OFF CALENDAR ____ MOVING PARTY'S REQUEST _X_ NONAPPEARANCE _____ STIPULATE

_X_ THE ABOVE MATTER IS CONTINUED/ ~~ASSIGNED~~ TO 1-7-97 at 9AM on L+M

___ SUBMITTED ON POINTS AND AUTHORITIES WITHOUT ARGUMENT.

___ MATTER ARGUED BY COUNSEL AND SUBMITTED.

___ MOTION GRANTED _____ MOTION DENIED

___ DEMURRER _____ SUSTAINED _____ DAYS TO AMEND.

_____ OVERRULED _____ DAYS TO ANSWER.

_____ GROUNDS _____

___ THE ABOVE MATTER IS TAKEN UNDER SUBMISSION.

___ POINTS AND AUTHORITIES TO BE SUBMITTED BY _____ NO

LATER THAN _____ AND BY _____ NO

LATER THAN _____

___ NOTICE OF RULING IS _____ WAIVED IN OPEN COURT.

_X_ tent. ruling adopted.
Pltf and Deft's motions are continued to 1-7-97. Re: Pltf's summary adjudication: PLTF TO FILE POS by 12.1. Deft to file and serve OPP. (if any) to Pltf's summary adjudication motion by 12-26-96. Reply, if any, by 12.30.

Re: Deft's cross-motion for summary adjudication: Deft to file & serve separate statement in compliance w/CCP and local court rules by 12-20-96; opposition separate statement to be file served by 12-27-96.

_X_ LET A WRITTEN ORDER BE PREPARED, SIGNED AND FILED.

DATE: 12-10-96

NATURE OF PROCEEDINGS: 394184

LAW AND MOTION MINUTE FORM

[p. 88] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: ARAM SERVERIAN, JUDGE/
DATE: December 17, 1996

DEPT. NO.: 41
CLERK: M. WAGGENER
REPORTER: UNREPORTED

FILE NO.: 394184

(TITLE OF ACTION) (APPEARANCES)

MECHANICAL CONTRACTORS ASSOC., ETC.

VS

GREATER BAY AREA ASSOC., ETC.

NATURE OF PROCEEDINGS
SETTLEMENT CONFERENCE

The above matter dropped from calendar, stipulation and order signed and in the file resetting the trial and settlement conference date.

[p. 89] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: HARLAN K. VEAL JUDGE
DATE: January 13, 1997
FILE NO: 394184

DEPT. NO.: 41 M. WAGGENER CLERK
UNREPORTED REPORTER

(TITLE OF ACTION) (APPEARANCES)

MECHANICAL CONTRACTORS ASSOC., ETC.

Plaintiff

vs.

GREATER BAY AREA ASSOC. OF PLUMBING, ETC.

Defendant

NATURE OF PROCEEDINGS
MINUTE ORDER VACATING SANCTIONS

Pursuant to letter dated Jan. 7, 1997 from James Carter, the Court hereby vacates its prior order imposing sanctions in the above entitled matter in the amount of $250.00.

[p. 90] CARTER & CARTER
ATTORNEYS AT LAW
425 CALIFORNIA STREET
NINETEENTH FLOOR
SAN FRANCISCO, CA 94104

[Letterhead Omitted In Printing]

January 7, 1997

The Honorable Harlan J. Veal
San Mateo Superior Court
401 Marshall Street
Redwood City, CA 94063

Re: MCA v. GBA – Case No. 394184 –
Motions for Summary Adjudication
Heard on January 7, 1997

Dear Judge Veal:

Your tentative ruling on the above matter ruled that plaintiff had failed to file a proof of service in accordance with Judge Forcum's earlier order, and sanctioned counsel for plaintiff the amount of $250 for failure to so file.

When we received Judge Forcum's order, we checked our files and determined that a proof of service had been filed on October 28, 1996. I also called Mr. Croley, counsel for GBA, to determine whether he had received all of plaintiff's moving papers. He verified that he had. Attached hereto is a copy of the endorsed filed Notice of Motion, and a copy of the Proof of Service executed by Brian M. Carter and filed with the court on that date. Having reviewed the file and determined that the Proof of Service had been duly filed, it was my belief that Judge Forcum did not have a copy of the Proof of Service in his files, but since a copy was in the Court file, I did not believe it necessary to file an additional Proof of Service.

It was for that reason that an additional Proof of Service was not filed.

In view of the fact that a Proof of Service had been duly filed, I would like to ask that you vacate the order imposing sanctions.

Respectfully submitted,

/s/ James A. Carter
James A. Carter

JAC:mq
Enclosure/Copy of Proof of Service

cc: Daniel A. Croley, Esq. (w/encs.)

Kim C me p/s 1/10/97
Tnx
Min. entry vacating sanctions + mail to
[illegible]

[p. 91] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
San Francisco, CA 94104-2204
Telephone: (415) 989-4800

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION; SEPARATE STATEMENT OF ISSUES AS TO WHICH THERE IS NO SUBSTANTIAL CONTROVERSY, ASSOCIATED FACTS AND SUPPORTING EVIDENCE; DECLARATIONS OF LOYD WILLIAMS, GARY SAUNDERS, JAMES CARTER, SCOTT STRAWBRIDGE AND BRIAN CARTER IN SUPPORT OF MOTION Date: ~~11/25/96~~ 11/27/96 L.T. Time: 9 a.m. Dept.: LAW & MOTION

TO: Defendant GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS and LITTLER, MENDELSOHN ET AL, ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on November 25, 1996, at 9 a.m., or as soon thereafter

* * *

[p. 92] **PROOF OF SERVICE**

BY HAND DELIVERY (VIA MESSENGER)

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is: 425 California Street, 19th Floor, San Francisco, California 94104.

On October 28, 1995 I served the attached:

1. NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION
2. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
3. SEPARATE STATEMENT OF ISSUES AS TO WHICH THERE IS NO SUBSTANTIAL CONTROVERSY, ASSOCIATED FACTS AND REFERENCE TO SUPPORTING EVIDENCE
4. DECLARATION OF JAMES A. CARTER IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
5. DECLARATION OF LOYD WILLIAMS IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
6. DECLARATION OF GARY SAUNDERS IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
7. DECLARATION OF SCOTT STRAWBRIDGE IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION
8. DECLARATION OF BRIAN CARTER IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

On the interested parties in the within action by personally delivering (via messenger) a true copy thereof at the following address:

Mr. Daniel Croley
Littler, Mendelsohn et al
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 28, 1996.

/s/ Brian M. Carter
Brian M. Carter

[p. 93] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

JUDGE DEPT. NO. 41
DEPUTY CLERK Donna Carter
Honorable Harlan K. Veal

CASE NO. 394184
COURT REPORTER
Pam Fisk

DATE 07 JAN 1997

TITLE OF ACTION: MECHANICAL CONTRACTORS ASSOC OF NO CALIF., VS. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, ETC

NATURE OF EVENTS: 01.DEFT. PLUMBING-HEARING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC'S CROSS-MOT FOR SUMMARY ADJUDICATION (12-10)

02.PLTF. MOTION FOR SUMMARY ADJUDICATION ___ (11-27) (12-10)

None _____ APPEARANCES

_____ _____ APPEARANCES

___ OFF CALENDAR _____ MOVING PARTY'S REQUEST XX NONAPPEARANCE __STIPULATION

___ THE ABOVE MATTER IS CONTINUED/ASSIGNED TO _____

XX SUBMITTED ON POINTS AND AUTHORITIES WITHOUT ARGUMENT.

__ MATTER ARGUED BY COUNSEL AND SUBMITTED.

__ MOTION GRANTED _____ MOTION DENIED

__ DEMURRER __ SUSTAINED _____ DAYS TO AMEND.

__ OVERRULED _____ DAYS TO ANSWER.

__ GROUNDS _____

__ THE ABOVE MATTER IS TAKEN UNDER SUBMISSION.

__ POINTS AND AUTHORITIES TO BE SUBMITTED BY _____ NO

LATER THAN _____ AND BY _____ NO

LATER THAN _____

__ NOTICE OF RULING IS _____ WAIVED IN OPEN COURT.

XX There being no appearances, the tentative ruling was adopted as the Order of the Court as follows:

Both Motions – Denied. Neither Moving Party has met its initial Burden of Proof per CCP § 437c.

No Proper Proof of Service of Plaintiff's Motion. Plaintiff's counsel sanctioned $250 pursuant to Local Court Rule 0.2 for non-compliance with Local Rule 0.8 contents of Proof of Service requirements, payable to the Superior Court by January 30, 1997.

Declaration of Scott Strawbridge filed in violation of Order of Judge Forcum not considered by the Court.

XX LET A WRITTEN ORDER BE PREPARED, SIGNED AND FILED.

DATE: January 7, 1997

NATURE OF PROCEEDINGS: Motions for Summary Adjudication

LAW AND MOTION MINUTE FORM

cc: James A. Carter, Esq.

[p. 94] **GEORGE J. TICHY, II CSB 941146**
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California Corporation,	**Case No. 394184**
Plaintiff,	**STIPULATION AND ORDER TO FILE SECOND AMENDED ANSWER**
v.	(Filed Feb. 10, 1997)
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation,	
Defendant.	

[p. 95] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a CALIFORNIA CORPORATION,	**Case No. 394184**
Plaintiff,	**STIPULATION AND ORDER TO FILE SECOND AMENDED ANSWER**
v.	
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a CALIFORNIA CORPORATION,	
Defendant.	

Plaintiff Mechanical Contractors Association's ("Plaintiff" or "MCA") and Defendant Plumbing-Heating-Cooling Contractors Association of the Greater Bay Area, Inc.'s ("Defendant" or "GBA") stipulate as follows:

[p. 96] 1. GBA will file and serve upon MCA's counsel by mail the SECOND AMENDED ANSWER TO UNVERIFIED COMPLAINT, a copy of which is attached as Exhibit A.

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA

DATED: January 30, 1997

BY: /s/ James Carter
JAMES CARTER

of **CARTER AND CARTER**

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS

DATED: January 30, 1997

BY: /s/ Daniel A. Croley
DANIEL A. CROLEY

of **LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON**
A Professional Corporation

IT IS SO ORDERED based on the parties above-referenced Stipulation.

DATED: 2-10-97

/s/ Illegible
JUDGE OF THE SUPERIOR COURT

[p. 97] **EXHIBIT A**

[p. 98] **GEORGE J. TICHY, II CSB, 941146**
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a CALIFORNIA CORPORATION, Plaintiff, v. **GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a CALIFORNIA CORPORATION,** Defendant.	**Case No. 394184** **DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC. SECOND AMENDED ANSWER TO UNVERIFIED COMPLAINT**

[p. 99] Defendant Plumbing-Heating-Cooling Contractors Association Of Greater Bay Area, Inc. ("Defendant") answers the unverified Complaint of Mechanical Contractors Association of Northern California ("Plaintiff") as follows:

I

GENERAL DENIAL

1. Defendant generally denies each and every allegation of Plaintiff's unverified Complaint.

II

AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to Plaintiff's Complaint, and alleged causes of action, and each of them, Defendant alleges as follows:

FIRST AFFIRMATIVE DEFENSE

1. Plaintiff's Complaint and alleged causes of action, and each of them, fail to state facts sufficient to constitute a cause of action against Defendant.

SECOND AFFIRMATIVE DEFENSE

2. Plaintiff's claims are preempted in whole or in part by the National Labor Relations Act (the "NLRA"), including without limitation, section 8(d) of the NLRA. 29 U.S.C. § 141, *et seq.*

THIRD AFFIRMATIVE DEFENSE

3. Plaintiff's Complaint and causes of action, and each of them, alleges an agreement which is unlawful under the NLRA, including without limitation, section 8(d) of the NLRA; thus, the agreement is void under Civil Code sections 1608 and 1667. 29 U.S.C. § 141, *et seq.*

FOURTH AFFIRMATIVE DEFENSE

4. Plaintiff's Complaint and causes of action, and each of them, are barred by, or the relief Plaintiff seeks is unavailable under, the principle of Mistake of Fact.

[p. 100] **FIFTH AFFIRMATIVE DEFENSE**

5. Defendant is informed and believes and thereon alleges that Plaintiff has failed to avoid or minimize any and all damages which are alleged to have been caused by Defendant, and Defendant's liability to Plaintiff, if any, should be denied or reduced accordingly.

SIXTH AFFIRMATIVE DEFENSE

6. Plaintiff's Complaint and causes of action, and each of them, are barred, or the relief Plaintiff seeks is unavailable, in whole or in part by Plaintiff's fraudulent misrepresentations and/or omissions.

SEVENTH AFFIRMATIVE DEFENSE

7. Plaintiff's Complaint and causes of action, and each of them are barred by, or the relief which Plaintiff seeks is unavailable under, the doctrine of estoppel.

EIGHTH AFFIRMATIVE DEFENSE

8. Plaintiff's Complaint and causes of action, and each of them, are bared or excused by Plaintiff's failure of performance.

NINTH AFFIRMATIVE DEFENSE

9. Plaintiff's Complaint and alleged causes of action and each of them, fail to state a claim against Defendant because Local 393 and/or Local 467 are not parties to the agreement(s) and/or contract modification(s) alleged and/or because any acquiescence by them to the agreement(s) and/or modification(s) alleged is not in writing.

TENTH AFFIRMATIVE DEFENSE

10. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the agreement(s) alleged was not authorized or ratified in whole or in part by Defendant.

ELEVENTH AFFIRMATIVE DEFENSE

11. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the agreement(s) alleged is not supported in whole or in part by adequate consideration.

[p. 101] TWELFTH AFFIRMATIVE DEFENSE

12. Plaintiff's Complaint and causes of action, and each of them, fail against Defendant because the alleged entry into the alleged agreement(s) is an ultra vires act.

THIRTEENTH AFFIRMATIVE DEFENSE

13. From approximately September 1992, and continuing to the present, Plaintiff has been indebted to Defendant in an amount to be determined at trial. This indebtedness arose by virtue of contract administration funds which were due to Defendant but were paid to Plaintiff. This whole amount is unpaid and now due and, together with interest thereon at the applicable rate, must be set off against any amount awarded to Plaintiff in this action under California Code of Civil Code of Civil Procedure section 431.70 and/or any equitable right of recoupment and/or set off.

FOURTEENTH AFFIRMATIVE DEFENSE

14. Plaintiff's Complaint and causes of action, and each of them, are preempted, in whole or in part, by the Labor Management Relations Act and/or by federal common law applicable to collective bargaining agreements. 29 U.S.C. § 185, *et seq.*

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiff take nothing by its Complaint.

2. For its costs incurred herein.

3. That the amount of Defendant's claim against Plaintiff, together with interest at the applicable rate, be set off against any amount awarded to Plaintiff in this action.

[p. 102] 4. For such other and further relief as the Court may deem just and proper.

Dated: January 30, 1997

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
GEORGE J. TICHY, II
DANIEL A. CROLEY

By: /s/ Daniel A. Croley
DANIEL A CROLEY

Attorneys For Defendant
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS

[p. 103] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: JOHN G. SCHWARTZ, JUDGE
DATE: FEBRUARY 28, 1997
FILE NO.: 394184

DEPT. NO: 18 CLERK: LENA CASTRO
REPORTER: UNREPORTED

(TITLE OF ACTION) (APPEARANCES)

MECHANICAL CONTRACTORS ASSOC OF NO CALIF.

JAMES A. CARTER, for Plaintiff

Plaintiff

vs.

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, ETC

DAN CROWLEY, for Defendant

Defendant

NATURE OF PROCEEDINGS
MANDATORY SETTLEMENT CONFERENCE

UNREPORTED Conference held in chambers with Court and counsel stated above. Matter did not settle.

[p. 104] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: ARAM SERVERIAN, JUDGE
DATE: March 17, 1997
FILE NO.: 394184

DEPT. NO: 3 CLERK: RUTH DeMOSS
REPORTER: UNREPORTED

(TITLE OF ACTION)

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHER CALIFORNIA

VS

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, ETC

(APPEARANCES)

James A. Carter
for pltf.

Daniel A. Croley
for deft.

NATURE OF PROCEEDINGS
SETTLEMENT CONFERENCE – Day of Trial

Unreported conference held in chambers with Court and above named counsel.

Case did not settle and remains set for trial.

Case is returned to the Department of the Presiding Judge, Department 8, for assignment for trial.

[p. 105] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: JUDITH W. KOZLOSKI JUDGE
DATE: March 17, 1997
FILE NO.: 394184

DEPT. NO: 10 FITZGIBBON CLERK
UNREPORTED REPORTER

(TITLE OF ACTION)	(APPEARANCES)
MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA	JAMES CARTER FOR PLAINTIFF
Plaintiff	
vs.	
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,	DANIEL A. CROLEY PRES. FOR DEFT.
Defendant	

NATURE OF PROCEEDINGS COURT TRIAL DAY -1

COUNSEL FOR RESPECTIVE PARTIES FILED THEIR DOCUMENTS WITH THE COURT CLERK AS FOLLOWS:

DEFENDANT'S MOTION IN LIMINE. COUNSEL DIRECTED TO RETURN ON 3/18/97 AT 9:00 A.M. FOR FURTHER COURT TRIAL

---

(2)

Supreme Court, U.S.
FILED

981486 MAR 16 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,

Petitioner,

v.

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

APPENDIX
VOLUME II, PAGES 169-357

LITTLER MENDELSON, P.C.
GEORGE J. TICHY II, CSB No. 041146
DANIEL A. CROLEY, CSB No. 154386*
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Attorneys for Petitioner
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF THE GREATER BAY AREA, INC.
* *Counsel of Record*

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189 pp

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[p. 106] GEORGE J. TICHY II, CSB 941146
DANIEL A. CROLEY, CSB 154386
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Attorneys for Defendant
PLUMBING-HEATING-COOLING
CONTRACTORS ASSOCIATION OF
GREATER BAY AREA, INC.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California Corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.'S NOTICE OF MOTION IN LIMINE Date: March 17, 1997 Time: 9:00 a.m. Dept. The Presiding Judge (Filed MAR. 17, 1997)

TO: PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Plumbing-Heating-Cooling Contractor Association of Greater Bay Area, Inc. ("GBA") will, and hereby does, move the Court for an Order granting its Motion In Limine on March 17, 1997 at 9:00 a.m., or as soon thereafter as this matter may be heard in the above-entitled Court located at 401 Marshall Street, Redwood City, California 94063.

GBA's Motion In Limine will be based on this Notice; on GBA's accompanying Memorandum of Points and Authorities in Support of Its Motion in Limine; on the Declaration of [p. 107] Daniel A. Croley and on all exhibits attached thereto; on any oral argument which may be given at the hearing; and on all pleadings, records and papers on file in this action.

Dated: March 13, 1997

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation

By: /s/ Daniel A. Croley
DANIEL A CROLEY

Attorneys For Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

[p. 108]GEORGE J. TICHY II, CSB 941146
DANIEL A. CROLEY, CSB 154386
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Attorneys for Defendant
PLUMBING-HEATING-COOLING
CONTRACTORS ASSOCIATION OF
GREATER BAY AREA, INC.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California Corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE Trial Date: March 17, 1997 Time: 9:00 a.m. Dept. The Presiding Judge (Filed MAR. 17, 1997)

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[p. 114]

I. INTRODUCTION

This is a breach of contract case which was brought by Plaintiff Mechanical Contractors Association Of Northern California ("Plaintiff" or "MCA") against Defendant.[1] The legal issue in this case is whether an Agreement entered into between MCA and GBA is valid and enforceable. The parties agree that this case may be resolved, because the facts are undisputed, as a matter of law. (*See* Croley Decl., at ¶¶2-3.)

However, MCA refuses to enter into a stipulation permitting this Court to resolve the case on the law. According to its counsel, MCA seeks to use the Court as a stage to air its undisputed story. MCA seeks to take the stage, according to its counsel, to experience some metaphysical or cathartic release. (Croley Decl. at ¶4.)

MCA needs to face reality. This case is not a Grecian tragedy where a cathartic purge of poisonous emotions is needed before a resolution may be reached. This Court

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[1] Both parties are associations composed of various employers; both associations negotiate collective bargaining agreements with unions on behalf of the Associations' members. The Associations earn contract administration funds ("CAF's"), pursuant to the collective bargaining agreements ("CBA's"), for hour worked by their members' employees. (*See* GBA's Separate Statement of Undisputed Material Facts (hereinafter referred to as "DUMF ___"), *attached as* Exhibit A to Declaration of Daniel A. Croley In Support of Motion ("Croley Decl."), filed herewith, at DUMF 1, 2, 3. *See also*, MCA's Separate Statement of Undisputed Material Facts (hereinafter referred to as "PUMF ___"), *attached as* Exhibit B to Croley Decl., at PUMF 1, 2.)

clearly has a heavy litigation docket, which causes litigants who actually need a finder-of-*fact* to resolve factual controversies to face inevitable delays in getting their cases tried. Giving MCA a precious courtroom, solely to permit some spiritual or emotional cleansing, would only add to the gridlock. Simply put, this Court should not waste its valuable time and resources on a case that could be resolved based on legal principles alone.

This Court has the authority to decide this case through a motion in limine to exclude all the evidence which MCA would seek to introduce at trial. The Court's authority to grant either such motion was recently recognized by the Court of Appeal in *Edwards v. Centex Real Estate Corporation*, 97 Daily Journal D.A.R. 2147 (filed February 27, 1997). Either such relief would be appropriate in this case because, as described further below, the underlying Agreement is not valid and enforceable as a matter of law. Accordingly, GBA respectfully urges the Court to grant its motion in limine for the exclusion of all evidence.

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II. STATEMENT OF FACTS

A. Terms Of The Collective Bargaining Agreements.

GBA and MCA are parties to separate collective bargaining agreements ("CBA") with various unions, and their respective members who are signatory contractors are also subject to those collective bargaining agreements. (DUMF 1, 2; PUMF 1; Complaint ("Compl."), at ¶5.)

Under the CBAs, contract administration and industry funds are earned by and paid to the respective associations for all work performed by union members employed by the association's signatory contractors. The CBAs may be modified only by a writing signed by an authorized representative of every party to the CBAs. (DUMF 3; PUMF 2; Compl., at 5.)

B. The Private 1994 Contract Between MCA and GBA.

In 1993, a dispute arose between MCA and GBA regarding contractors moving from GBA to MCA during midterm of the CBAs. (DUMF 5, 7, 8; Compl., at ¶6.) In an effort to resolve this dispute, GBA and MCA agreed, in writing, as follows: (1) MCA would give GBA $5,000 immediately in exchange for an assignment of GBA's right to recoup its $5,000 in "seed money" from CPMCA; (2) the disputes between MCA and GBA were deemed resolved; and (3) to avoid such disputes in the future, both associations agreed that their members could switch associations by giving written notice to both associations and that "funds" which were earned after the effective date of the association change would be paid to the member's new association. (DUMF 9-10; Compl., at ¶¶7-8, 11.)

Assuming that the January 7, 1994 letter is an agreement between GBA and MCA, it constitutes a midterm modification of the applicable CBAs. (PUMF 4, 6.) MCA also agrees that the concerned Unions never agreed to, or waived their right to agree to, this modification in a

writing signed by duly authorized Union representatives.[2] According to MCA, the Unions impliedly or orally agreed to whatever modifications [p. 116] were decided upon by MCA and GBA. (*See* Compl, at ¶¶9-10.) Thus, according to MCA itself, no duly authorized Union representative ever consented in writing to a modification of the CBAs. Furthermore, no notice was given to any state or federal mediation agency concerning this modification. (PUMF 8.)

C. Events After the 1994 Letter.

MCA, GBA and Local 467 agreed to a "memorandum of understanding" by which they extended and modified the Local 467 Agreement (PUMF 10.) The memorandum of understanding was effective *July 1, 1994, nearly six (6) months after the date of the 1994 Agreement.* The Local 467 Agreement contained the following integration clause:

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[2] MCA has argued that the Unions have essentially provided the requisite "writing" when submitting declarations in support of MCA's motion for summary judgment. (PUMF 5, 20) MCA's argument is dubious at best and deliberately misleading at worst. First, MCA's Complaint flatly states that the Unions orally waived their right to object or to consent to a contract modification. (*See* Compl., at ¶¶9-10, stating that the unions repeatedly "stated" to MCA that they would agree to whatever the two parties decided; DUMF 12.) Second, an after-the-fact declaration does not constitute a contemporaneous "writing". It is merely a regurgitation of what happened; and what happened is, by MCA's own words, only an oral waiver. MCA can reinvent the past through litigation documents prepared in the present and its attempt to do so reflects its desperation in this matter.

> This agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the parties shall be bound by or liable for, any statement, representation, promise, inducement or agreement not set forth herein.

(PUMF 11.) When MCA and GBA extended their CBA with Local 467, the 1994 Agreement was not incorporated into the respective CBAs. (PUMF 12.)

III. LEGAL ARGUMENT

A. Motion In Limine And A Motion For An Order Of Nonsuit.

1. A Motion In Limine.

A trial court has inherent power to entertain and grant a motion in limine. C.J.E.R., *Judges Bench Book, Civil Trials* § 3.12 *et seq.*; 3 Witkin, *California Evidence* (3d ed) § 2011. A motion in limine may be brought at any time to exclude evidence before that evidence is offered at trial. *Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 451 (citations omitted); *see also Dong v. Board of Trustees of Leland Stanford Junior Univ.* (1987) 191 Cal.App.3d 1572, 1585, *cert. denied,* 108 S.Ct. 731.

2. A Motion In Limine That Excludes All Evidences Operates Essentially As A Motion For Nonsuit.

In contrast to the usual motion *in limine,* which seeks to keep particular items of evidence from a jury, there exists an unusual form of *in limine* motion which is called

an "objection to all evidence." Such an objection seeks to exclude all evidence in order to end the trial before it even begins. *Edwards, supra,* [p. 117] 97 D.A.R. at 2149. Such an objection is properly sustained where, even if the plaintiff's allegations were proven, they would not establish a cause of action. *Id.*[3]

The Court of Appeal recently explored the parameters and effect of an "objection to all evidence" in the *Edwards* case. *Edwards, supra,* 97 D.A.R. at 2149. There, the defendants' motions in limine filed an objection which sought to bar all the plaintiff's statements on the basis of the litigation privilege. *Id.* The Court of Appeal noted that,

> In net effect, respondents' motions *in limine* constituted an objection to any and all evidence on the grounds appellants' pleadings were fatally defective and had failed to state a cause of action. As such, they operated as a general demurrer to appellants' complaints or a motion for judgment on the pleadings. . . . Alternatively, because in this case the trial court granted these motions at the outset of trial with reference to evidence already produced in discovery, they may be viewed as the functional equivalent of an order sustaining a demurrer to the evidence, or nonsuit.

Edwards, 97 D.A.R. at 2149 (citations omitted).

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[3] *See also Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 451; *Miller v. McLaglen* (1947) 82 Cal.App.2d 219, 223; 6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 272, p. 571; 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 954, pp. 410-411.

The *Edwards* court found that the standard for granting either type of motion is the same, namely, whether the plaintiff has stated a cause of action as a matter of law. As with a demurrer,

> a motion for nonsuit or demurrer to the evidence concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case. A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference which may be drawn from the evidence, it determines there is *no* substantial evidence to support a judgment in the plaintiff's favor.

Id. (emphasis in the original).

Here, the standard for an *Edwards* "objection to all evidence" is clearly satisfied. Stripping aside occasionally obscure terminology, the material facts of this case are undisputed. Both parties agree that they attempted to modify the provisions of the CBA's concerning CAF's and contractors switching associations by the 1994 letter Agreement. (PUMF 4, 6.) Both parties agree that the Agreement was solely between MCA and GBA and both parties also agree that neither of the Unions who were also parties to the CBAs agreed to the Agreement in writing. (PUMF 1, 5, 7; Compl., at ¶¶9-10.)

[p. 118] The principal disagreement between the parties is whether a written modification agreement from the Unions was required before the 1994 Agreement was valid and enforceable. However, this is an issue of law and not of fact. Accordingly, it need not be resolved by a

fact-finder but, rather, by an *Edwards* motion in limine. This motion should be granted because, for all the reasons stated below, MCA has failed to state a claim as a matter of law.

B. The Agreement At Issue In This Case Is Not Valid Or Enforceable As A Matter Of Law.

1. As Necessary Parties to the CBAs, The Unions' Waivers of A Contractual Right Had To Be In Writing And Their Failure To Do So Invalidates The Alleged Modifications Of The CBAs.

Courts strictly honor and enforce "no oral modification" and complete agreement/integration clauses appearing in collective bargaining agreements. *Martinsville Nylon Employees v. NLRB* (D.C. Cir. 1992) 969 F.2d 1263, 140 L.R.R.M. 2873, 2875-76. The *Martinsville* court held collective bargaining agreements that expressly prohibit oral changes may not be modified orally under *any* circumstances. *Id.* at 1265-68. This is a *per se* rule, which would invalidate any oral agreement. The *Martinsville* court, thus, rejected an old common law rule permitting oral modifications of contracts that expressly prohibit them. *Id.*

Here, the following facts are undisputed: (1) the 1994 Agreement allegedly modifies the respective CBAs; (2) the CBAs may only be modified in a writing signed by duly authorized association and Union representatives;[4]

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[4] The Master Labor Agreements explicitly state that any modification of the contracts must be in writing and given to the

and 3) and any agreement or waiver by the Unions concerning the 1994 Agreement was oral and not in writing. (PUMF 3, 4; DUMF 12; Compl., at ¶¶9-10.)

These facts are fatal to MCA's claim. *Martinsville's per se* rule renders the Unions' oral modification of the CBA ineffective and void as a matter of law. *Martinsville, supra,* 969 F.2d at 1265-68.

2. MCA's Legal Authority Is Outdated And A Legal Anomaly.

In response, MCA has argued that the Court is shackled to a Ninth Circuit decision, holding that a collective bargaining agreement that prohibits oral modifications can nonetheless be modified by an oral agreement, because it is the law of this circuit. (*See* MCA's Opposition Brief ("Opp."), *attached as* Exh. C to [p. 119] Croley Decl., at p. 6, *relying on Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996* (9th Cir. 1979) 597 F.2d 1269 (hereinafter referred to as "Hawaii Teamsters").)

That is not so. Because there is a conflict among federal circuits on this issue, this Court is not handcuffed by *Hawaii Teamsters. Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 879 (where there is a conflict in federal decisions, California courts are not bound by any one decision).

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other parties of the CBA 60 days ahead of time. For example, the 467 CBA states that the agreement shall automatically continue unless one party provides written notice to the other of "its desire to amend . . . the Agreement." The 393 Agreement contains similar language.

Rather, the Court should embrace the modern cases which strictly prohibit oral modifications of written agreements if the agreements do *not* allow them. *Martinsville Nylon Employees v. NLRB* (D.C. Cir. 1992) 969 F.2d 1263. *Merk v. Jewel Food Stores* (7th Cir. 1991) 945 F.2d 889, 894 (prohibiting an oral, side agreement that modified a CBA under the Parol Evidence Rule); *Gatliff Coal Co. v. Cox* (6th Cir. 1945) 152 F.2d 52, 56, (holding the NLRA "clearly precluded . . . reliance upon a prior or contemporaneous oral agreement to modify the terms of the written collective bargaining agreement.")

There are several reasons why the Court should adopt *Martinsville* as the better-reasoned rule. First, *Martinsville* represents the position of the California Legislature. The Legislature has already enacted the modern rule as stated in *Martinsville* in Civil Code section 1698(c) which states, "*Unless the contract otherwise expressly provides,* a contract in writing may be modified by an oral agreement. Civ. Code § 1698(c).

Second, *Martinsville's* "no oral modification" rule better serves all parties to a contract. Like the Uniform Commercial Code rule upon which it is modeled, a "no oral modification" rule "enables those parties who mutually value certainty in their relations to have it." *Martinsville,* 969 F.2d at 1267. In fact, "all potential parties to a CBA are better off under the UCC rule, which gives them the flexibility to specify as they see fit how their agreement may be modified." *Id.* Flexibility entails giving labor and management the option of having fully integrated agreements and of banning oral side agreements.

Third, because such flexibility and certainty achieve the federal policy of maintaining industrial peace, *Martinsville* effectuates the objectives of federal labor law far better than the rule espoused by the Ninth Circuit in *Hawaii Teamsters*. Although *Hawaii Teamsters* ostensibly sought to achieve this same goal, the

> *court did not, however, explain how overriding a negotiated no – oral – modification clause encourages negotiation of industrial disputes. We think it more likely that judicial disregard for the parties' expressed intent that any modification be in writing is more likely to promote industrial strife by encouraging provocation about who said what to whom, and to create uncertainty about what a court will determine or the actual obligations of the parties. . . .* [¶]
>
> [p. 120] With virtually nothing to commend receiving the common law rule into 'the federal common law of collective-bargaining agreements,' . . . we are confident that the UCC rule will better serve the purposes of collective bargaining and of industrial peace.

Martinsville, 969 F.2d at 1267 (emphasis added).[5]

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[5] MCA's attempt to distinguish the *Martinsville* decision on the grounds that the Unions in this case were uninvolved, unaffected bystander and that employee rights were unaffected by the 1994 Agreement is not persuasive. (Opp., at 7.) MCA's own conduct belies this characterization. If the Unions were the uninvolved bystanders, then MCA would never have bothered to contact them in the first place. Obviously, the only reason why MCA contacted them and sought their permission is that they – along with their employee members – would be affected by the 1994 Agreement. CAFs paid to MCA and GBA under the CBAs, like union dues paid by employees under the same CBAs,

Fourth, *Martinsville*, unlike *Hawaii Teamsters*, is not a legal anomaly but rather, is supported by other cases. *See e.g., Lewis v. Seanor Coal* (3rd Cir. 1967) 382 F.2d 437, 441-45 (parol evidence of oral modification to a written collective bargaining agreement are inadmissible), *cert. denied*, 390 U.S. 947 (1968); *Gatliff Coal, supra*, 152 F.2d at 56 (the NLRA "clearly precluded . . . reliance upon a prior or contemporaneous oral agreement to modify the terms of the written collective bargaining agreement"); *Wilkes Barre Printing Pressman and Assistants' Union v. Great Northern Press* (M.D. Pa. 1981), 522 F. Supp. 106, 109. For example, the *Wilkes* case says:

> Once the existence of a binding contract has been established, [parol evidence offered to contradict the terms of a collective bargaining agreement] will be disallowed as part of a general policy to protect workers from collusive oral agreements between management and union leadership.

In addition, *Merk, supra*, which used the parol evidence rule to prohibit an oral, side agreement that modified a CBA, also addressed the dispositive issue in this case as follows:

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powerfully, though indirectly, affect employee's wages and terms of employment. Employees' wages and CAFs are linked because employers must charge more for the employees' services in order to cover the additional cost associated with the CAFs. Each of these points substantiates the need for this Court to follow the *Martinsville* "no-oral modification" rule. Indeed, strictly enforcing the provisions against oral modifications effectuates not only the parties written promise, but federal labor policy as stated above.

> Section 8(d) of the National Labor Relations Act does not require collective bargaining agreements to be in writing *unless one of the requests that they be.*

Merk, supra, at 894 (*citing, Gatliff Coal, supra,* at 56) (emphasis added).

In short, *Martinsville,* unlike *Hawaii Teamsters,* does not stand alone. A handful of decisions strictly enforce prohibitions against oral modifications and those decisions overshadow *Hawaii Teamsters,* which is [p. 121] more than a generation old. Accordingly, the Court should adopt the modern view and find that an oral agreement is ineffective to modify a contract that expressly prohibits such oral changes.[6]

3. MCA's Remaining Arguments On The Modification Issue Are Equally Unpersuasive.

Plaintiff asks the Court to ostensibly destroy the parties' promise against oral modification because the

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[6] In its Reply papers, MCA's only response appears to be that general principles of contracts do not apply when collective bargaining agreements are involved. (MCA's Reply Brief, attached as Exh. D to Croley Decl., at 2-3.) MCA's argument is flatly wrong. "Collective bargaining agreements are governed by traditional rules of contract interpretation as long as their application is not inconsistent with federal labor policy." *Armistead v. Vernitron Corp.* (6th Cir. 1991) 944 F.2d 1287, 1295. In fact, courts have not hesitated to apply contract principles to CBAs. *See Lewis, supra,* 382 F.2d at 441-45 (parol evidence); *Wilkes, supra,* 522 F. Supp. at 109 (same); *International Union, United Auto., Aerospace, Agri. Implement Workers of America v. Yard-Man, Inc.* (6th Cir. 1993) 716 F.2d 1476, 1479 (same).

Agreement modifies only the CBA provisions dealing with CAFs as opposed to, *inter alia,* employees' wages. (Opp., at 7.) This argument, if accepted, would mean that that the prohibition against oral modifications would apply to some, but not all of the provisions of the CBAs. Worse, negotiators will *not* know in bargaining or administering the CBAs which provisions can be, or cannot be, orally modified notwithstanding the prohibition against *all* oral modifications. They will have to wait for a court to tell them perhaps decades later, that their CBAs were modified by an oral, side agreement. These facts, taken together demonstrate that the Unions could only modify the CBAs in writing; and their undisputed failure to do so renders their oral consent ineffective and the 1994 Agreement invalid.

As the foregoing makes clear, MCA's claim on this issue may be disposed of on the basis of existing legal principle and without incurring the cost and delay of trial. Accordingly, GBA respectfully urges the Court to use its authority to exclude all MCA's evidence from trial.

C. Even If An Oral Wavier Is Sufficient, MCA's Claim Is Meritless.

1. The Parol Evidence Rule Bars Admission Of The Alleged Oral Waivers By The Unions Because They Would Contradict The Terms Of The 1994 Agreement Which Is A Partially Integrated Writing.

Whether the 1994 Agreement "is an integration is a question of law for the judge" to decide *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 805. " 'The

court shall determine whether the [p. 122] writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein. . . . ' " *Id.* (*citing* Code Civ. Proc., § 1856, Subd. (d).)

An integrated agreement may appear in a variety of forms. *Id.*[7] When an agreement is partially integrated, "parol evidence is admissible only to prove an oral term of the contract *not inconsistent* with the written memorialization." *Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 638. (Emphasis added.) Moreover, a collective bargaining agreement – like any contract – is subject to the parol evidence rule. *Merk, supra,* 945 F.2d 892-93; *Lewis, supra,* 382 F.2d at 441-45; *Gatliff, supra,* 152 F.2d at 56; *Wilkes, supra,* 522 F. Supp. 106, 109.

Here, the Parol Evidence Rule defeats MCA's attempts to argue that the Unions are ostensibly parties to the 1994 Agreement. The 1994 Agreement is a partially integrated writing and the Unions' oral agreements were allegedly made *prior to* 1994 Agreement. Under the Parol Evidence Rule, the Unions' oral agreements *cannot contradict the fact that only MCA and GBA are parties to the 1994 Agreement.* Accordingly, MCA cannot rely upon the prior oral agreements to in essence make the Unions parties to

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[7] Illustrations of writings that are *not* final and complete expressions of an understanding are: minutes of meeting *Lawrence v. Premier Indem. Assure. Co.* (1919) 180 Cal. 688, 697; a receipt *Haidinger-Hayes Marvin Hime & Co.* (1962) 206 Cal.App.2d 46, 52 and a book account *Epley v. Cunningham* (1955) 134 Cal.App.2d 614, 616.

the 1994 Agreement. Because evidence of the Unions' oral waivers is inadmissible, MCA's claim must fail.

As the foregoing analysis makes clear, MCA's claims may be disposed of without wasting the Court's valuable time on a bench trial. Accordingly, GBA respectfully urges the Court to use its authority to exclude all MCA's evidence from trial.

2. The Subsequent Local 467 CBA Superseded The 1994 Agreement.

Assuming the 1994 Agreement and Local 467's oral agreement modified the respective CBAs, that modification was superseded by a powerful integration clause in a subsequent CBA. The Local 467 written Agreement provides:

> This agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the parties shall be bound by or liable for, any statement, representation, promise, inducement or agreement not set forth herein.

[p. 123] The Associations and Local 467, in writing, modified and extended their respective CBAs effective July 1, 1994. The earlier 1994 Agreement (dated January 7, 1994) was not added, expressly or otherwise, to the Local 467 Agreement and, thus, it does not survive after the July 1, 1994 Agreement. Because MCA claims damages under the 1994 Agreement and the Local 467 Agreement for contractors moving from GBA to MCA *after* the 1994

Agreement had been subsumed, MCA's claims under the Local 467 Agreement fail.

MCA has never opposed this argument on the merits. Instead, at the summary judgment phase of this matter, it argued that the integration defense fails because it is arbitrable under the CBAs. It is MCA that brought this action, and as a result, it has waived any argument that the underlying claim or the integration defense is arbitrable. *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 318-19 ("Consistent with established law, we hold that, in the absence of a legal excuse, a party's failure to timely demand arbitration results in a contractual forfeiture of the right to compel arbitration."); *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888, 899.[8]

In short, MCA cannot defeat the integration defense which becomes yet another method of disposing of MCA's rights to any CAF's under the 467 Agreement short of a bench trial. GBA respectfully urges the Court to use its authority to exclude all of MCA's evidence that it is entitled to CAFs under the 467 Agreement from trial.

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[8] If GBA's integration defense is arbitrable, so too is MCA's contract claim because both arise out of a contract that provides for grievance arbitration. Accordingly, if the Court distinguishes *Platt Pacific* and finds that MCA has not waived its claim that GBA's integration defense is arbitrable, then GBA would move to amend its answer to allege that MCA's claims are barred by the arbitration agreement in the CBAs.

3. The 1994 Modifications Also Violate The Notice Requirements Of Federal Labor Law.

The modifications purportedly wrought by the 1994 Agreement are also null and void under Section 8(d) of the NLRA. 29 U.S.C. § 158(d.) Section 8(d) states that a party may only withdraw or modify a collective bargaining agreement if: (1) they provide written notice to the opposing side; and (2) notify state and federal mediation and conciliation services of the proposed contractual changes and any dispute relating thereto. The Supreme Court has declared that "the statutory notice requirement operates independently of whatever notice requirement the parties have fixed for themselves." *NLRB v. Lion Oil Company* (1957) [p. 124] 352 U.S. 282, 292-293. Accordingly, regardless of whether oral modification is permitted by a understanding between parties, failure to comply with Section 8(d) constitutes a violation of the NLRA.

Indeed, in *United Marine Division, Local 333* (1977) 228 N.L.R.B. 1107, a collective bargaining agreement between an employers' association and a union provided that the union could terminate the agreement as to any employer which was 30 days late on its insurance, pension and health and welfare contributions. The union, pursuant to that contract provision, terminated a member of the employers association. Because the union gave no notice under Section 8(d), that termination was an invalid modification. *Id.* at 1107.

In its papers opposing summary judgment, MCA was unable to distinguish these controlling legal authorities and, as a result, chose to ignore them. Instead, it offered

MCA's legal authority that is inapposite and easily distinguishable. (Opp., at 6-7.) MCA contends that the courts and the National Labor Relations Board do not require a section 8(d) notice for a mid-term modification of the contract. (MCA's Opp. to MSJ at 8 n.2.) In support of this proposition, MCA cited *NLRB v. Graphic Communications Local 554 (World Color Press)* (7th Cir. 1993) 991 F.2d 1301. (*See* Opp., at 8 n.2.)

However, MCA misconstrues the focus of that decision. In *World Color Press*, the National Labor Relations Board concluded that section 8(d) notice need not be given when the parties sit down to *renegotiate a labor contract prior to its natural expiration. World Press*, 991 F.2d at 1306. That is not the case here because the parties *never* sat down to formal renegotiation talks concerning the underlying CBAs. Instead MCA and GBA merely reached a side agreement whose indirect effect is to act as a mid-term modification of the contract. This indirect modification is not the type of renegotiation that was the subject of *World Color Press*. Accordingly, the modification allegedly wrought by the 1994 Agreement is void under California Civil Code §§ 1608, 1667.

D. MCA's Preemption Argument Is Without Merit.

Finally, Plaintiff opposes each of GBA's defenses to the Agreement, arguing they are preempted by Section 301 of the Labor Management Relations Act ("LMRA") and by the National Labor Relations Act ("NLRA"). (*See* MCA's Opp., at 2-4, 6.) MCA is mistaken on several grounds.

[p. 125]

1. There Is Also No Preemption When The NLRA Is Used Defensively, As Here, Instead Of Offensively.

Similarly, GBA's defense under section 8(d) is not preempted by the NLRA because GBA has employed the NLRA defensively, rather than offensively. It has been settled for nearly two decades that offensive use of the NLRA outside the auspices of the National Labor Relations Board is preempted, while defensive use of the NLRA is not. *Kaiser Steel Corp. v. Mullins* (1982) 455 U.S 72, 109 LRRM 2268. *Kaiser* amplifies this distinction as follows:

> . . . where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court *must* entertain the defense. While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e) [of the NLRA.]

Id.[9] Where the law as MCA represents, "parties could be compelled to comply with the contract clauses, the

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[9] As a corollary, while defenses aimed at a particular provision of a collective bargaining agreement (*e.g.* provisions here dealing with CAFs) are not preempted, defenses attacking the legality of an entire collective bargaining agreement are preempted. *Glaziers and Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors* (9th Cir. 1982) 689 F.2d 1339, 1343-44 (the employers' challenge to the entire collective bargaining agreement because the union lacked majority status was preempted); *Milk Drivers and Dairy Employees Union, Teamsters Local 302 v. Vevoda, et al.* (9th Cir. 1985) 772 F.2d 530 (a claim that the entire collective bargaining agreement was illegal on the basis of fraudulent inducement was preempted.)

lawfulness of which would be insulated from review by any court." *Id.*

Because GBA raises section 8(d) only in connection with its illegality defense directed at the 1994 Agreement and not the entire CBAs, the Court has jurisdiction and the obligation to consider it.

2. Preemption Does Not Apply Because The Court Can Resolve This Dispute By Reference To The Undisputed Facts and Without Interpreting The CBAs.

MCA first argues that the Court has no jurisdiction to hear the case under Section 301(a) of the LMRA. (29 U.S.C. § 185(a).) MCA is incorrect because section 301(a) confers federal jurisdiction over lawsuits for violation of the collective bargaining agreements. (29 U.S.C. § 185(a).) State courts have *concurrent* jurisdiction, but they must "apply federal law in exercising jurisdiction over litigation within the purview of Section 301(a)." *Carpenters Health & Welfare Trust Fund v. Acme Industries, Inc.* (1990) 224 Cal.App.3d 187 (quoting *Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 102).

[p. 126] MCA's second argument is that GBA's defenses are preempted under Section 301(a). MCA is wrong again. In order to create the "inextricable" relationship which triggers Section 301(a) preemption, resolution of a claim or defense must require the interpretation of a collective bargaining agreement. Mere reference to or application of the collective bargaining agreement to resolve a claim or defense does not create the "inextricable" relationship. *Allis-Chalmers Corporation*

v. Lueck (1985) 471 U.S. 202, 220 (quoting *Lingle v. Norge Division of Magic Chef, Inc.* (1988) 486 U.S. 399, 412-15.)

California courts have reached the same conclusion. *Hillhaven Oakland Nursing, Ctr. v. Health Care Workers Union* (1996) 41 Cal.App.4th 846, 860. In *Hillhaven*, the Court of Appeal stated, "We recognize that the mere assertion of a reference to a collective bargaining agreement does not warrant preemption." *Id.* at 860. *See also, Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal.App.3d 1507, 1517 (simply reviewing the document to determine if the CBA has applicable provisions does not equal, in and of itself, an interpretation of the agreement.)

Here, resolution of GBA's defenses may occur *without* construing the CBAs. Instead, the Court may rely on the following undisputed facts to resolve the question of whether the CBAs could be modified by the 1994 Agreement:

1. GBA and MCA are parties to separate collective bargaining agreements with various unions, and their respective members who are signatory contractors are subject to those collective bargaining agreements.

2. The collective bargaining agreements at *issue required all changes to be in a writing* signed by a duly authorized representative of every party to the collective bargaining agreement. (Emphasis added.)

3. Assuming the January 7, 1994 letter is an agreement between GBA and MCA, it constitutes a midterm modification of the applicable collective bargaining agreements.

4. *The concerned Unions never agreed* to, or waived their right to agree to, this modification *in a writing* signed by a duly authorized Union representative. (Emphasis added.)

5. Master Labor Agreement with Local 467 contained the following integration clause: "This Agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the parties shall be bound by or liable for, any statement, representation, promise, inducement or agreement not set forth herein."

6. No notice was given to any governmental agency concerning this modification to the applicable collective bargaining agreements.

[p. 127] (DUMF 1-8.) Because the Court need not construe the meaning of underlying CBAs to reach a determination of the issues in this case, there is no Section 301 preemption. *Lingle*, 486 U.S. at 412-15; *Hillhaven*, 41 Cal.App.4th at 860; *Wanland*, 230 Cal.App.3d at 1517.

3. Preemption Is A Double-Edged Sword And, If Plaintiff's Preemption Argument Is Accepted, Then MCA's Claims Are Also Subject To Preemption And Must Be Dismissed.

Even assuing, *arguendo*, that MCA's argument were correct, preemption only serves to undercut the validity of MCA's own claims which derive from the very same basis as GBA's defenses. In the words of MCA, Section 301 "preemption should be equally applicable *to a defense*

which involves interpretation of a labor contract *as to a claim* which involves its interpretation." (Opp., at 4; emphasis in the original.)

Here, MCA's claims arise out of the same Agreement as GBA's claims. That Agreement, according to MCA's own Statement of Undisputed Material Facts, was a mid-term modification of the underlying CBAs. To determine whether that modification was effective and to grant MCA the declaratory relief which it seeks, then clearly those CBAs must be examined. As a result, resolution of MCA's claims is as dependent on the CBAs as Defendant's defenses ostensibly are and, if preemption is accepted, MCA's own claims must logically be pre-empted, too. *See Allis-Chalmers, supra*, 471 U.S. at 221 (holding "when resolution of a state-law claim is substantially dependent upon analysis of the terms of a . . . [cba], that claim must either be treated as Section 301 claim . . . or dismissed as pre-empted by federal labor-contract law.").

In short, assuming one accepted MCA's preemptive-sword argument, that sword would equally pierce MCA's claim of *a valid and enforceable Agreement*, because MCA's contract claim and GBA's defenses derive from the same 1994 Agreement and CBAs. MCA's selective argument, if accepted, would mean GBA's defenses to MCA's contract claims are preempted, while the underlying contract claim itself is not. Thus, MCA's position is fatally flawed. (*See* MCA's Opp. to MSJ, at 5, fn 1.) Accordingly, whether the Court accepts GBA's defenses or MCA's preemption argument, every road leads to judgment for GBA and against MCA.

[p. 128]

IV. CONCLUSION

For all the foregoing reasons, GBA respectfully requests that the Court grant GBA's motion *in limine* and exclude all of MCA's evidence from trial.

Dated: March 12, 1997

LITTLER, MENDELSON,
FASTIFF, TICHY & MATHIASON
A Professional Corporation

By: /s/ Daniel Croley
DANIEL A. CROLEY

Attorneys for Defendant
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IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA'S RESPONSE TO GREATER BAY AREA, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE Trial Date: March 17, 1997 Time: 9 a.m. Dept.: The Presiding Judge (Filed Mar. 17, 1997)

For purposes of brevity, we will adopt the same abbreviations used in GBA's Memorandum of Points and Authorities in Support of Motion in Limine ("Memo").

MCA agrees with probably 90 percent of the factual representations set forth in GBA's Memo. However, as the Court will later recognize, the omissions, and context, of the facts and application of the legal authorities to undisputed facts will demonstrate that GBA has seriously misled this Court with its legal analysis, and it is MCA which must prevail as a matter of law.

The right of MCA and GBA to CAF funds under the respective Collective Bargaining Agreements are based upon third-party beneficiary principles. The CBA's are contracts between [p. 130] the Unions and Associations by which contractors agree to pay funds to the Association which represents them for both collective bargaining and contract administration. As GBA states, those funds are paid as an equivalent to union dues, in order to compensate the Associations for providing necessary services to member contractors.

Prior to the execution of the 1994 Letter Agreement, two of GBA's member contractors became disenchanted with GBA's performance of contract administration services and wished to transfer to MCA, which they believed provided superior services. The effort by those two contractors to transfer to MCA, in order to obtain the advantages of its superior services, led to a conflict between MCA and GBA which placed both of the affected Local Unions in a difficult and embarrassing position. The officers of both Local Unions advised the officers of **both** MCA and GBA that the Local Unions did not wish to get involved in representation issues between employers and Employer Associations. It was their position that such representation was strictly a matter for the employers, and they, the Local Unions, did not wish to be

involved in any such disputes or the resolution of any such disputes. They also advised that any resolution acceptable to the Employer Associations and signatory contractors would be acceptable to the Unions.

In order to attempt to resolve those disputes, without involving the Local Unions, officers of GBA and MCA met on several occasions, and the dispute was finally resolved when MCA sent to GBA the Letter Agreement of January 7, 1994. That Letter Agreement was accepted by GBA, **it accepted the $5,000 check** accompanying the proposed Agreement, and thereafter **accepted the transfer of a contractor from MCA to GBA** on the basis of the Letter Agreement.

It was only when two members of GBA thereafter decided to switch their representation to MCA that the new officers of GBA decided to repudiate the 1994 Letter Agreement. GBA came up with various theories in an effort to avoid the loss of funds associated with complying with the Letter Agreement. For example, GBA asserted that there was no consideration, that the Letter Agreement was invalid because it had to be ratified by the GBA members, and argued that the ratification by the Board of Directors was insufficient as a matter of law; it argued that, notwithstanding that the GBA President had signed the Letter Agreement, a subsequent Board [p. 131] meeting instructed him to "clarify" the Letter Agreement, and since he did not obtain such clarification, the Letter Agreement was invalid. It was only after all of those spurious defenses were shown to be invalid that GBA's counsel, in a mighty creative effort, decided to turn this bad faith repudiation into a literal "federal case" by

asserting that the Letter Agreement was invalid because of the federal labor law issues addressed in the Memo.

GBA continues to argue, in clear bad faith, that the 1994 Agreement violated the notice requirements of federal law (Memo page 10, line 17, *et seq.*). GBA cites *NLRB v. Lion Oil*, attached as Exhibit 13. Contrary to GBA's assertions, *Lion Oil* involved the authority of a party to strike after having given the notice required by 8(d). In *Lion Oil*, the significant issue that led to a Supreme Court decision was the practice of parties to collective bargaining agreements to enter into long-term agreements and provide for midterm re-openers on selected subjects, such as wages, benefits, etc. The issue before the Court involved the interplay of notice and right to strike. Since there was no right to strike involved in this case, *Lion Oil* has no applicability.

GBA relies on *Union Marine* (Memo page 11, line 3) in support of its proposition that the Letter Agreement is invalid for lack of notice. That case is set forth in Exhibit 17 and is clearly inapposite. It involved the authority of a union to **terminate** a contract based on delinquency, and then to engage in a work stoppage, all without giving the notice under 8(d). The Board held that such a notice was required. Clearly the holding and rationale of that case are inapposite to these facts.

Finally, GBA attempts to distinguish *NLRB v. Graphic Communications (World Color Press)*, (Memo page 11, line 13, *et seq.*). That case is set forth in Exhibit 14 and *contra* to GBA's position, clearly supports MCA that no notice was required. The Court there upheld a NLRB holding that: "in cases of mid-term renegotiation, 'there is no

necessity that the conventional notice, required by Section 8(d) . . . be given . . . " GBA attempts to distinguish that case by limiting its holding to a case where the: "parties sit down to renegotiate a labor contract prior to its natural expiration." (Memo page 11, lines 16-17). GBA apparently contends that the rationale and holding do not apply here because all parties did not "sit down" in one place at one time. Rather, GBA and MCA "sat down" to discuss their representation, after being advised by [p. 132] both of the Unions that the Unions would approve anything that GBA and MCA agreed, and the Unions did not want to be part of their discussions. Any such attempt to distinguish the NLRB rationale, and to provide that notice be given to federal agencies upon an assignment of the bargaining rights from one Association to the other, is patently absurd.

We might also note that the very purpose of that notice is to permit mediation services to facilitate contract negotiations and thus avoid strikes or labor disputes which would impair interstate commerce. Clearly a change of the type described in the Letter Agreement could have no impact on interstate commerce, and both CBA's contain no strike clauses. Thus it would be completely wasteful of the time of governmental agencies for them to receive and process notices of assignments.

That leaves GBA with one remaining concocted defense – that the Letter Agreement is invalid because it was not contemporaneously signed by the two Local Unions. It is that one factor which may require testimony at trial – why were the Local Unions not asked to sign the Letter Agreement? In fact, the reason they were not asked to sign was because the Local Unions had advised **both**

MCA and GBA that the Unions did not want to be involved in any agreements or disputes involving contractor representations and that both Unions would accept any Agreements which were satisfactory to the affected employers. Those facts are set forth in the Declarations of the Business Managers of both Local Unions, and as noted in the Declaration of Carter attached hereto, counsel for GBA has agreed to stipulate that said Union officers, if called as witnesses, would testify in accordance with their Declarations.

In an additional supplement to the undisputed facts before the Court, MCA could also provide testimony that at a luncheon meeting in December 1993, which led to the Letter Agreement of January 1994, the officers of GBA objected to bringing the Unions into discussions regarding the Agreement, advising that this was, as the Unions had noted, a matter between the employers and stating that it would be improper to involve the Unions in the Agreement between MCA and GBA. These facts, if stipulated by GBA without presentation of testimony, would give rise to an estoppel argument, and would also be significant in connection with the Court's determination of the correct legal rule to apply to GBA's proposed "no oral [p. 133] modification" policy.

It is MCA's belief that the Court need not even reach the complexities of federal law regarding amendments to Collective Bargaining Agreements if the Court simply characterized the Letter Agreement between MCA and GBA as an assignment of rights to contributions from affected contractors. Since both Local Unions had stated they did not wish to be involved in contractor representation issues, the Unions certainly would have no objection

to GBA or MCA assigning, outside the Collective Bargaining Agreement, rights to contract administration funds paid by contractors under a CBA. By characterizing the Letter Agreement as an assignment of rights by a third-party beneficiary, the Court would avoid the complex legal issues which GBA raises concerning midterm modifications.

Under the CBA's the named beneficiaries of the CAF's are the Employer Associations. However, the actual intended beneficiaries of those funds are the contractors who pay the funds, since those are the entities to receive the benefits provided by the Association in administering the contracts. The Letter Agreement constitutes an assignment by the Associations that funds paid under the CBA's may go as directed in assignments by the contractors. In this case the Letter Agreement constitutes an assignment from GBA to MCA (and vice versa), subject to a subsequent assignment by the interested contractor. The two contractors at issue in this dispute have both executed writings requesting that their funds be paid to MCA to compensate it for representing them in contract administration. Accordingly, both the named intended beneficiary and the actual intended beneficiaries in this case have agreed that their funds, required to be paid under the CBA's, should be paid under a separate Agreement which MCA seeks to enforce. See *Witkin, Summary of California Law, Ninth Edition, Vol. I, Contracts,* section 656. It is also clear that the intended beneficiary – here GBA – may waive its rights to receive funds under the CBA. If it may waive those rights, then it may assign them to MCA. See *Witkin, supra,* section 660. It is also clear that third-party beneficiary rights may be asserted

under Collective Bargaining Agreements. See *Witkin, supra,* section 668.

Characterizing the Letter Agreement as an assignment would in fact be consistent with the underlying purpose of the contractors in transferring their contract administration funds from [p. 134] an Association which, in the contractor's judgment, is not performing its contract administration functions in a satisfactory fashion, to an Association which it believes will perform those functions to the contractor's satisfaction. Since the very purpose of those funds is to permit contractors to be adequately represented in their dealing with the Unions, it seems entirely equitable that those funds should go to the Association selected by the contractor. Failure to permit such assignment would force a contractor to be represented by an Association which is not performing to its satisfaction, and to reward that Association for deficient performance. On the other hand, upholding the assignment would encourage Associations to perform their services in a competent fashion, thereby leading to competition between Associations which can only be beneficial to the industry.

The Unions obviously subscribe to the foregoing analysis because they wish the contractors to be represented by the Association of the contractor's choosing. There is an obvious benefit to Union leaders because they can deal more effectively with contractors' ongoing disputes if the Union is dealing with an Association which has the confidence of the contractor. Since the contract administration funds are to serve that very purpose, it is also in the Unions' interest that those funds go to the Association selected by contractor.

If the Court deems the Letter Agreement to be an assignment, then it should be upheld since it was voluntarily negotiated between the parties, GBA received the benefit of that Agreement, and should now be held to performance of its own assumed obligations thereunder.

World Color Press, Exhibit 14, is significant for a reason totally unrelated to that cited by GBA. In that case, as here, the union was attempting to set forth numerous legal arguments to avoid being held to an Agreement it had negotiated. In addition to having its 8(d) notice defense rejected, the union also attempted to argue that its own Agreement should not be enforced because the Agreement had not received the approval of the international president, as required by the current CBA. The Court there rejected that purported defense, holding that the authority to obtain that approval suggested a correlative duty of due diligence on the part of the Local to seek such approval. The Court held that the dilatory tactics of the Union, in "obtaining the benefit of the bargain, and then asserting the failure of the international to approve of the [p. 135] contract, . . . gave rise to an estoppel situation." Exhibit 14, page 7. MCA believes that similar estoppel provisions may be applied against GBA. GBA signed the Letter Agreement, received the benefit of the bargain, and then urges that it should not be held to its correlative duty to perform that bargain because of the technical defense that the Unions did not sign the Letter Agreement. The reason the Unions were never asked to sign the Letter Agreement was because GBA never made any such request. As in *World Color Press*, this should "give rise to an estoppel situation" against GBA.

Assuming, *arguendo*, that the Court elects to reach the so-called "oral modification" issue, then we suggest that, after analyzing the unique facts of this case and the policy issues involved, the Court should uphold the Letter Agreement against GBA's arguments.

GBA's argument that: "Courts strictly honor and enforce 'no oral modification' . . . clauses . . . ", citing the *Martinsville* case (Memo, page 3, line 10), is clearly misleading and deceptive. The *Martinsville* case, set forth in Exhibit 10, is not controlling or even persuasive authority. We urge this Court to read the dissent, where several interesting observations are made. First of all, the panel's purported holding regarding oral modifications is described as "dicta." More significantly, the dissent notes: "My colleagues' stated preference for strict enforcement of 'no oral modification' clauses was neither subscribed to by the NLRB nor even argued to us on appeal." The dissent then goes on to analyze the Ninth Circuit decision in *Certified Corp.*, as well as analyzing various Supreme Court decisions, all leading to the conclusion that *Certified Corp.* set forth a superior policy analysis. The dissent also noted, quite accurately, that there was "no judicial precedent" in support of the majority dicta.

GBA in its Memo then asserts that its position is supported by the Seventh Circuit decision in *Merk*, (page 6, lines 6-8). We urge the Court to read the *Merk* opinion, set forth as Exhibit 11. Unlike the openly disclosed position of the Unions in this case, and the concurrence of all parties in the procedure employed in adopting the Letter Agreement, in *Merk* the Court rejected "secret oral negotiations between union officials and company management that modify central terms of a collective bargaining

agreement which was submitted to the union membership for ratification . . . " Sound policy reasons supported the Court's decision in *Merk*. The same [p. 136] policy reasons have no applicability whatsoever to this case.

GBA relies on *Gatliff*, (Memo page 6, line 9), but that opinion set forth as Exhibit 4 provides no support for GBA's position. In that case the issue before the Court was whether individual common law contracts between a company and its employees were overturned by a Collective Bargaining Agreement. Needless to say, the Court enforced the supervening authority of the Collective Bargaining Agreement. That case has no applicability to the facts before this Court.

GBA relies upon the *Lewis* case, (Memo page 7, line 6), set forth in Exhibit 8. That case provides no support to GBA because it concerned a purported promise of the president of a local union that: "the productivity per employee would increase . . . " The Court noted that it could be declared ineffective because it "lacks definiteness and is vague and uncertain", but went on to hold it prohibited because of the special provisions applicable to welfare funds. The Court noted the legislative history of the statute in question as being " . . . part of the larger congressional concern over corruption of union officials and coercion of employers, to the detriment of honest bargaining relationships." On the basis of that legislative history, and the specified language governing such welfare funds, the Court concluded that oral agreements could not modify obligations to pay welfare funds. Since the welfare fund statute is not involved in this case, neither that holding nor its rationale provides any support to GBA.

A review of the cases cited by GBA concerning "oral modifications" of CBA's, discloses that the underlying purpose is to protect the integrity of labor-management relationships and the rights negotiated by employees. Those rules also seek to avoid credibility disputes concerning what was said in oral modifications, and to avoid potential suborning of Union officials through improper management manipulation of personal relationships or providing economic inducements which could undermine the integrity of the Union officials. **None** of the policy issues addressed in those cases is present in this case.

In this case it is undisputed that the officials of **both** Unions advised officials of **both** Associations of the Unions' positions regarding transfer of contractors between Associations. The Unions would approve any such transfers as agreed by the employers. GBA can point to no [p. 137] policy issue which should require that the Unions sign amendments to the Collective Bargaining Agreements, when the only change is that of employer representation. The rights of Union members are not impacted, and there is no secrecy because all parties were advised of the position of the Union officials. Requiring the Unions to sign amendments to the Agreements would serve no worthwhile purpose, nor would a Court decision upholding that Letter Agreement undermine any principle of federal labor law which has been articulated in any case cited by GBA.

MCA would agree that no trial is necessary in this case, and that it may be decided as a matter of law, upon

the addition of the stipulations set forth in the attached Declaration of James A. Carter.

Respectfully submitted,

/s/ James A. Carter
James A. Carter
Attorney for Plaintiff,
Mechanical Contractors
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DATED: March 16, 1997

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IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 DECLARATION OF JAMES A. CARTER IN OPPOSITION TO MOTION IN LIMINE Trial Date: March 17, 1997 Time: 9 a.m. Dept.: The Presiding Judge

I, JAMES A CARTER, declare:

1. I am an attorney at law duly licensed to practice before all the courts of the State of California and am a partner in Carter & Carter, counsel for plaintiff herein.

2. I have reviewed the Declaration of Daniel A. Croley dated March 13, 1997. Paragraph 2 thereof is correct, with one significant omission: I stated that I **believed** the action could be resolved based on stipulated and undisputed facts. I stated that if Judge Schwartz, or the Presiding Judge, could issue an Order that the case be adjudicated on the stipulations and other papers previously set forth in the Motions for Summary Adjudications, so that we did not [p. 139] have to prepare for or attend trial, I would stipulate that the matter could be decided on the record before the Court. Judge Schwartz stated that he could not issue such an Order.

3. After we left the settlement conference I spoke to Mr. Croley and suggested that we endeavor to come up with a single set of stipulations, governing matters previously set forth as well as the estoppel issues that I would wish to raise. I suggested that we speak further on the phone about those issues. I thereafter had several telephone conversations with Mr. Croley concerning future proceedings. I told him once again that the only trial issues which I had not raised in the earlier motions, and which I believed I could not raise because they involved potential factual disputes, involved estoppel against his clients. I stated that if he would consider some supplemental stipulations, then I would agree that no trial testimony would need to be presented. The stipulations I requested were the following:

(1) That the Declarations of Lloyd Williams and Gary Saunders might be considered by the trial court as testimony presented in Court and that both parties would waive rights to any cross-examination. Mr. Croley stated that he would have no objection to stipulating as proposed, but would not be willing to waive objections to relevancy or materiality of that testimony. I told him those reservations were acceptable to me.

(2) I told Mr. Croley that Scott Strawbridge had testified in his deposition to statements made by GBA officers at the luncheon meeting in December 1993 where GBA's officers had suggested that the parties **not** contact the Unions about the proposed MCA-GBA Agreement because this was a matter between the Associations and did not involve the Unions. I asked him to consider a stipulation that Mr. Strawbridge's deposition testimony might be deemed admitted, and I asked him to propose a stipulation as to what testimony his clients would give concerning their response to Mr. Strawbridge's deposition testimony. Mr. Croley later advised me that his clients did not recall this conversation, one way or the other, but he did not believe it was material in any event since the issue before the Court involved GBA's defense that the contract was unenforceable because not signed by the Unions. I stated that I believed estoppel principles made that testimony relevant.

[p. 140] **PROOF OF SERVICE**
BY HAND DELIVERY

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is:

425 California Street, 19th Floor, San Francisco, California 94104.

On March 17, 1997, I served the attached:

1. PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA'S RESPONSE TO GREATER BAY AREA, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE

2. DECLARATION OF JAMES A. CARTER IN OPPOSITION TO MOTION IN LIMINE

On the interested parties in the within action by personally delivering a true copy thereof to Mr. Daniel Croley, attorney for defendant Greater Bay Area Association of Plumbing and Mechnical Contractors.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 17, 1997.

/s/ James A. Carter
James A. Carter

[p. 141] **GEORGE J. TICHY II, CSB 941146**
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. **GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,** a California corporation, Defendant.	**Case No. 394184** **DECLARATION OF DANIEL A. CROLEY IN SUPPORT OF MOTION IN LIMINE** **Trial Date: March 17, 1997** **Time: 9 a.m.** **Dept.: The Presiding Judge** (Filed Mar. 17, 1997)

I, **DANIEL A. CROLEY,** declare and state that I have personal knowledge of the facts contained herein and, if called to testify as a witness, could and would testify competently thereto:

1. I am an attorney in the law firm of Littler, Mendelson, Fastiff, Tichy & Mathiason, A Professional Corporation, and I am authorized to practice before all courts of this State. I am one of the attorneys of record for Defendant Plumbing-Heating-Cooling Contractors Association of Greater Bay Area ("GBA").

2. On or about Friday, February 28, 1997, Judge Schwartz conducted a Settlement Conference in this matter. During the Settlement Conference, the parties, through their counsel of record, stated that this action could be resolved based on stipulated and undisputed facts.

[p. 142] 3. On or about Monday, March 3, 1997, MCA's attorney, James Carter telephoned me. We agreed that this action, because it raised no material factual disputes, could be resolved by the Court without a trial. In order to present the Court with a record, Mr. Carter agreed to review the undisputed material facts in the parties' Separate Statements in Support of their Motion for Summary Judgment.

4. On March 5, 1997, Mr. Carter advised me that his client wanted to tell his story through live testimony in court. I advised Mr. Carter that it was outrageous to waste the Court's or GBA's precious time and resources in this manner given that the material facts were undisputed. Mr. Carter responded that there was "great psychological value" in being able to tell one's story through

live testimony in court. He suggested that my clients might also benefit from such a cathartic experience. I advised Mr. Carter that any "psychological value" does not justify wasting the Court's or GBA's resources.

5. Attached as Exhibit A is a true and correct copy of Defendant Plumbing-Heating-Cooling Contractors Association of Greater Bay Area, Inc.'s Separate Statement in Opposition to Plaintiff's Motion for Summary Judgment.

6. Attached as Exhibit B is a true and correct copy of Plaintiff's Separate Statement in Opposition to Defendant's Cross-Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues.

7. Attached as Exhibit C is a true and correct copy of Plaintiff's Memorandum of Points & Authorities in Opposition to Defendant's Cross-Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues.

8. Attached as Exhibit D is a true and correct copy of Plaintiff Mechanical Contractors Association of Northern California's Reply to Defendant's Opposition Memorandum of Plaintiff's Motion for Summary Adjudication.

[p. 143] I declare under penalty of perjury under the laws of the State of California that this Declaration is true, correct and complete. Executed at San Francisco, California on March 13, 1997.

/s/ Daniel A. Croley
DANIEL A. CROLEY

[p. 144] **EXHIBIT A**

[p. 145] GEORGE J. TICHY II, CSB 941146
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IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California Corporation, Plaintiff, v. **GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,** a California corporation, Defendant.	**Case No. 394184** **DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.'S SEPARATE STATEMENT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION** **Date: January 7, 1997** **Time: 9:00 a.m.** **Dept.: 8 – Law and Motion** **Judge: Hon. Mark R. Forcum** **(Filed DEC. 26, 1996)**

[p. 146] Defendant Plumbing-Heating-Cooling Contractors Association of Greater Bay Area, Inc. (named herein as Greater Bay Area Association of Plumbing and Mechanical Contractors "and referred herein as "GBA") submits this Separate Statement in response to Plaintiff Mechanical Contractors Association of Northern California's ("MCA") Separate Statement of issues, associated facts and supporting evidence, pursuant to C.C.P. 437c(b) and Local Rule 3.9.

As to The Second Cause of Action: Declaratory judgment.

Plaintiff's Issue No. 1: Was the "Letter Agreement" a valid, enforceable contract?

Plaintiff's Material Fact	**Defendant's Position and Supporting Evidence if Disputed:**
1. MCA and GBA are both associations of mechanical contractors which act as bargaining agents for their respective members in conjunction with the applicable unions for purposes of both the negotiations leading to collective bargaining agreements and the administration of those agreements. Declaration of Scott Strawbridge in	1. Undisputed.

	Support of Plaintiff's Motion for Summary Adjudication ("Strawbridge Decl."), paragraphs 1 & 2.	
2.	Both GBA and MCA are parties to separate collective bargaining agreements with various unions under which both of their members perform contracting services. [p. 147] Strawbridge Decl. paragraphs 3 & 4.	2. Undisputed.
3.	MCA's and GBA's collective bargaining agreements provide for the payment of contract administration and industry funds ("funds") which are monies earned by the respective associations for all work performed by union members under the collective bargaining agreements to which that association is signatory. Strawbridge Decl., paragraph 4.	3. Undisputed
4.	Under the collective bargaining agreements, the funds are initially paid	4. Undisputed.

by the member contractor to a trust administrator which then distributes them to the appropriate association. Strawbridge Decl., paragraph 4.

5. During 1993 certain disputes arose between MCA and GBA concerning the ability of contractor-members to change associations while the applicable collective bargaining agreement remained in force and whether funds paid by those members after they changed associations. Strawbridge Decl., paragraph 5.

5. Undisputed.

6. Prior to the MCA/GBA disputes, both associations had joined a newly formed [p. 148] statewide association of contractors, the CPMCA. Strawbridge Decl., paragraph 6.

6. Undisputed.

7. GBA had contributed $5,000 of "seed money" to CPMCA while MCA did not contribute any "seed money." Strawbridge Decl., paragraph 6.

7. Undisputed.

8. GBA subsequently decided to withdraw from CPMCA, but because of a shortage of cash, CPMCA was unable to immediately refund GBA's "seed money." Strawbridge Decl., paragraph 6.	8. Undisputed.
9. Representatives of MCA and GBA, including their respective Presidents, met in December 1993 in an effort to resolve their disputes. During that meeting, Strawbridge stated that MCA had an idea which would resolve the disputes and that he would put that idea into a formal proposal which he would send to GBA for its consideration. Strawbridge Decl., paragraph 7.	9. Undisputed.
10. By letter dated January 7, 1994, MCA proposed an agreement with GBA whereby: (1) MCA would give GBA $5,000 immediately in exchange for an assignment of GBA's right to recoup its [p. 149] "seed money" from CPMCA; (2) the	10. Undisputed.

disputes between MCA and GBA were deemed resolved; and (3) to avoid repetitions of the disputes in the future, both associations would agree that their rights to funds paid under the relevant collective bargaining agreements be modified by a new agreement which provided that either association's members could switch associations by gibing (sic) written notice to both associations and that funds which were earned after the effective date of the association change would be paid to the member's new association. Strawbridge Decl., paragraph 7.

11. Because the modification of collective bargaining agreements proposed by MCA's offer would require the consent of the unions, MCA sought the advance approval of the unions. Strawbridge Decl., paragraph 8 Saunders Decl.

11. Undisputed, except that the unions' oral waivers were not sufficient to modify the affected collective bargaining agreements, for the reasons stated in Defendant's Opposition.

12. The business managers for both of the affected unions (U.A. Locals 467 and 393) stated that they would comply with whatever agreement was reached by [p. 150] MCA and GBA with respect to members who wished to change associations, thus waiving the provision of the collective bargaining agreements which required all changes to be in writing signed by a duly authorized representative. Strawbridge Decl., paragraph 8; Williams Decl.; Saunders Decl.	12. Undisputed, except that the oral waivers were not sufficient to modify the collective bargaining agreements, for the reasons stated in Defendant's Opposition.
13. MCA mailed the proposed agreement to GBA along with a check for $5,000 made out to GBA, and which stated that GBA could accept the offer by GBA's President, Ron Peterson ("Peterson"), initialing the letter after he had received authorization from GBA's Board of Directors. The letter explicitly stated that GBA must return the check if it did	13. Undisputed.

not accept the offer. Strawbridge Decl., paragraph 9 and Exhibit "A" thereto.

14. On or about January 20, 1994, Peterson complied with the instructions in the letter and accepted the letter agreement by initialing it and returning it to MCA. Strawbridge Decl., paragraph 11 and Exhibit "B" thereto.

14. Undisputed.

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15. On the same date, GBA sent confirmation to CPMCA that "MCA has taken GBA's position for the 'seed money'." Strawbridge Decl. paragraph 12 and Exhibit "C" thereto.

15. Undisputed.

16. GBA's Board of Directors decided to, and did, cash the $5,000 check from MCA. Strawbridge Decl., paragraph 13 and Exhibits "D" and "E" thereto.

16. Undisputed.

17. MCA relied on the existence of the MCA-GBA agreement by, *inter alia*: transferring certain fund

17. Undisputed.

contributions ($570.38) to GBA when GBA claimed to have provided services for the member (Metro Plumbing), even though the affected member had changed its affiliation to MCA as provided in the agreement; by allowing Egan Plumbing to change form (sic) MCA to GBA even though it would not have done so in the absence of the MCA-GBA agreement. Strawbridge Decl., paragraph 15.

18. GBA understood that MCA viewed the "letter agreement" as a binding contract. Park Deposition (Exhibit "B" to Brian Carter Decl.) 13:24-14:2.

18. Disputed because the 1994 Agreement is not valid or enforceable for the reasons stated in Defendant's Opposition.

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19. GBA never attempted to "terminate or change or repudiate" the agreement until the day before its President's Deposition (5/14/96). Park Deposition (Exhibit "B" to Brian Carter Decl.) 14:3-8.

19. Undisputed.

Plaintiff's Issue No. 2: Did The Letter Apply to The Current Collective Bargaining Agreement?

Plaintiff's Material Fact	Defendant's Position and Supporting Evidence if Disputed
20. MCA always intended and understood that the agreement which is at issue in this case applied to the collective bargaining agreements in force at the time the agreement was accepted by GBA. One of the main reasons MCA proposed that agreement was to resolve the dispute over entitlement to contract administration funds **under the then current collective bargaining agreements** (from Madlem Mechanical and Thermal Mechanical). At no time during the discussions or negotiations regarding the letter agreement did GBA, or anyone affiliated with GBA, ever state to Strawbridge that their understanding of the agreement was that it	20. Disputed because the 1994 Agreement is not enforceable or valid for the reasons stated in Defendant's Opposition.

would only apply to future collective bargaining agreement (sic) agreements. Further, GBA first asked that [p. 153] the proposed agreement be modified or limited so that it only applied to future collective bargaining agreements after the present dispute had arisen. Strawbridge Decl. paragraph 16.

21. The dispute between MCA and GBA concerned the then-current Collective Bargaining Agreements between GBA and Local Unions 393 and 467 and the authority of contractors bound by the GBA agreements to transfer to the MCA agreements. The "Letter Agreement" was intended to resolve the then current dispute (involving Madlem and Thermal) and to eliminate the threat of litigation between MCA and GBA concerning the contributions paid by Thermal and Madlem up to that time, as well as their

21. Undisputed.

future contributions paid by those contractors. Accordingly, the Letter Agreement, if it were to resolve that dispute, necessarily involved rights under the then-current Collective Bargaining Agreement. At no time in any of the correspondence did counsel for GBA ever advise MCA that GBA would agree to application of the right to transfer in the future but would not agree to allow any [p. 154] contractors to transfer to MCA under the then-current Master Agreements. James Carter Decl., paragraph 3 and Exhibit "A" thereto.

Dated: December 26, 1996

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation

By: /s/ Daniel A. Croley
DANIEL A CROLEY

Attorneys For Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

[p. 155] **EXHIBIT B**

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IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 PLAINTIFF'S SEPARATE STATEMENT IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES Date: 01/07/97 Time: 9 a.m. Dept.: 8 – LAW & MOTION Judge: Hon. Mark R. Forcum

Pursuant to CCP § 437c(b), Plaintiff submits this statement in opposition to Defendant's "Separate Statement of Issues as to Which There is No Substantial Controversy, Associated Facts and Reference to Supporting Evidence" dated December 20, 1996:

[p. 157] DEFENDANT GBA'S MATERIAL FACTS AND ALLEGEDLY SUPPORTING EVIDENCE:	PLAINTIFF MCA'S MATERIAL FACTS AND SUPPORTING EVIDENCE:
First & Second Causes of Action:	
Issue No. 1: Was the January 7, 1994 letter a valid, enforceable modification of the collective bargaining agreements.	
1 GBA and MCA are parties to separate collective bargaining agreements with various unions, and their respective members who are signatory contractors are subject to those collective bargaining agreements.	Undisputed.
Plaintiff's Undisputed Material Fact ("PUMF") 1 and 2; Plaintiff's Index to Declarations and Exhibits in Support of Motion for Summary Adjudication ("Plaintiff's Index") Exh. 1, 2:5-12.	

2	Under the collective bargaining agreements, contract administration and industry funds are earned by and paid to the respective associations for all work performed by union members employed by the associations's signatory contractors. PUMF 3; Plaintiff's Index Exh. 1, 2:5-12.	Undisputed.
3	The collective bargaining agreements at issue required all changes to be in a [p. 158] writing signed by a duly authorized representative of every party to the collective bargaining agreement. PUMF 12; Plaintiff's Index Exh. 1, 3:11-23; Complaint, 4:9-12.	Undisputed.
4	Assuming that January 7, 1994 letter constitutes an agreement between GBA and MCA, that agreement constitutes a modification of the collective bargaining agreement. PUMF 10 and 11.	Undisputed.

5	The concerned unions never agreed to, or waived their right to agree to, this modification in a writing signed by a duly authorized Union representative. PUMF 10, 11, 12 and 14; Defendant's Index to Declarations and Exhibits in Support of its Cross-Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues ("Defendant's Index") Exh. 3, 128:11-17; 141:14-142:4.	Disputed. At the time the Letter Agreement was executed there was no writing. However, both unions have now submitted Declarations which constitute such a writing. PUMF 12. Declarations of Gary Saunders & Lloyd Williams.

First and Second Causes of Action and Ninth Affirmative Defense:

Issue No. 2: The January 7, 1994 alleged letter agreement is unenforceable as unlawful under 29 U.S.C. § 158(d).

6	Assuming the January 7, 1994 letter is an agreement between GBA and MCA, it [p. 159] constitutes a midterm modification of the applicable collective bargaining agreements. MCA's attorney James Carter, in a letter to MCA, stated that the alleged agreement constitutes a midterm modification to the applicable collective bargaining agreements. PUMF 11; Defendant's Index Exh. 3, 58:17-59:20.	Undisputed.

7	Assuming the concerned unions waived their rights concerning the alleged January 7, 1994 letter agreement, that waiver was not in writing, but was made orally. PUMF 12; Plaintiff's Index Exh. 4, 2:2-10; Defendant's Index Exh. 3, 128:11-17; 141:11-142:4.	Disputed. At the time of the execution of the Letter Agreement there was no writing. However, since that time both unions have provided Declarations which constitute such a writing. PUMF 12. Declarations of Gary Saunders & Lloyd Williams.
8	No notice was given to any governmental agency concerning this modification to the applicable collective bargaining agreements. Defendant's Index Exh. 3, 128:18-129:10.	Undisputed.
9	When MCA negotiated basically the same deal with Local 38 that it allegedly negotiated with GBA, the applicable collective bargaining agreement was modified in a writing executed by MCA [p. 160] and Local 38. Defendant's Index Exh. 3, 51:22-52:19.	Undisputed.

First and Second Causes of Action:

Issue No. 3: The alleged agreement, insofar as it modified the associations' rights to contract administration funds under the master labor agreements with U.A. Union Local 467, was superceded by the integration clause in the new or extended collective bargaining agreements with U.A. Union Local 467.

10	Effective July 1, 1994 and under a memorandum of understanding, MCA and GBA extended and modified their respective collective bargaining agreements with Local 467. Defendant's Index Exhs. 1, 2:3-6 and 3, 137:8-139:25.	Undisputed.
11	The Master Labor Agreement with Local 467 contained the following integration clause: "This agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the parties shall be bound by or liable for, any statement, representation, promise, inducement, or agreement not set forth herein." Defendant's Index Exh. 3, 140:21-141:13.	Undisputed.

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12	When MCA and GBA extended the collective bargaining agreement with Local 467 by way of the memorandum of	Undisputed. The January 7, 1998 Letter Agreement was a "private agreement" between MCA and GBA.

	understanding, the alleged January 7, 1994 agreement was not incorporated into the respective collective bargaining agreements. Defendant's Index, Exh. 3, 139:20-25.	Defendant GBA's Memorandum of Points & Authorities in Support of Its Cross-Motion for Summary Judgment, dated November 13, 1996, page 1, lines 17-21.

First and Second Causes of Action:

Issue No. 4: The alleged January 7, 1994 letter agreement was terminated by GBA's May 16, 1996 letter to MCA.

13	On or about May 16, 1996, GBA sent a letter to MCA which states: "GBA hereby terminates that agreement effective immediately or at the earliest possible date allowed by law, whichever date occurs first." Defendant's Index Exhs. 1, 2:14-16 and 2, 1:22-27.	Undisputed.
14	The termination letter was sent to MCA via Return Receipt Requested. Return receipt was provided and indicated that MCA received the termination on May 17, 1996. Defendant's Index Exhs. 1, 2:14-16 and 2, 1:22-27.	Undisputed.

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15	The alleged January 7, 1994 agreement is an agreement of indefinite duration. Indeed, the January 7, 1994 agreement and the facts relating to it do not show that the agreement is for a fixed term. Defendant's Index Exh. 3, 122:1-123:6.	Undisputed.

First and Second Causes of Action:

Issue No. 5: The alleged January 7, 1994 agreement is not enforceable because the concerned unions never waived their respective rights concerning that agreement.

16	GBA never sought or received the concerned unions' waiver of their respective rights concerning modification to the collective bargaining agreements by the January 7, 1994 agreement. Defendant's Index Exh. 3, 141:14-142:4.	Disputed. GBA did receive the unions' waiver. PUMF 12. Declarations of Gary Saunders & Lloyd Williams. Supplemental Declaration of Scott Strawbridge.
17	Assuming the January 7, 1994 letter is an agreement, that agreement constitutes a modification of the collective bargaining agreement and would require the consent of the concerned unions. PUMF 11.	Undisputed. Both unions gave consent in advance. PUMF 12. Declarations of Gary Saunders & Lloyd Williams.

18	The January 7, 1994 letter was never submitted to either of the concerned unions for their consent or approval. Defendant's Index Exh. 3, 141:14-142:4.	Undisputed. Both unions had given their consent in advance. PUMF 12. Declarations of Gary Saunders & Lloyd Williams.

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19	MCA only enters into agreements with unions that are in writing and expressed in collective bargaining agreements or memoranda of understanding. Defendant's Index Exh. 3, 60:8-23:126:7-11: 139:20-140:9.	Undisputed. The Letter Agreement was not an agreement **with** the unions. The unions' "Policy" did not require a writing signed by the unions. PUMF 12. Declarations of Gary Saunders, page 2, lines 6-10 & Lloyd Williams, page 2, lines 5-14.
20	MCA has no writing stating that the concerned unions waived any of their rights implicated by the alleged agreement. Defendant's Index Exh. 3, 126:6-11.	Disputed. This statement was true prior to the execution of the declarations of the business managers of U.A. Local 393 and 467. As of the date of this hearing, both of said local unions have confirmed, in writing, their agreement to the provisions of the "private agreement" between MCA and GBA. PUMF 12. Declarations of Gary Saunders & Lloyd Williams.

Dated: December 27, 1996

Respectfully Submitted,

CARTER & CARTER

By: /s/ Michelle Q. Carter
Michelle Q. Carter
Attorney for Plaintiff
MECHANICAL
CONTRACTORS
ASSOCIATION OF
NORTHERN
CALIFORNIA

[p. 164] **PROOF OF SERVICE**

BY U.S. MAIL

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is: 425 California Street, 19th Floor, San Francisco, California 94104.

I am readily familiar with my employer's practices for collection and processing of correspondence for mailing with the United States Postal Service.

On December 27, 1996, I served the attached:

1. **PLAINTIFF'S SEPARATE STATEMENT IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES**
2. **SUPPLEMENTAL INDEX TO DECLARATIONS AND EXHIBITS IN SUPPORT OF**

PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

on the interested parties in the within action by placing a true copy (copies) of same enclosed in a sealed envelope with postage fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Mr. Daniel Croley
Littler, Mendelsohn et al
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 27, 1996.

/s/ Michelle Q. Carter
Michelle Q. Carter

[p. 165] **EXHIBIT C**

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IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES Date: 12/10/96 Time: 9 a.m. Dept.: LAW & MOTION

I. INTRODUCTION

Pursuant to CCP Section 437c, Defendant (hereafter "GBA") has moved for summary judgment or, in the alternative, summary adjudication of issues ("Motion") on the grounds that there is no triable issue as to any material fact concerning the validity and enforceability of the Agreement which is the subject of the action.

GBA's Points & Authorities seems implicitly to acknowledge that the Agreement, which is the subject of this litigation, would be valid as a "private agreement" under California contract law. This apparently admits that the earlier asserted defenses having to do with lack of [p. 167] consideration, and the argument that the Agreement applied only to future collective bargaining agreements, have now been dropped. This seems to acknowledge that if the Court rules against GBA on the legal contentions discussed below, then MCA's Motion should be granted.

GBA now asserts three propositions: (1) that the Agreement, having been entered into by MCA and GBA and without a contemporaneous writing executed by the Unions, is invalid and unenforceable under federal law; (2) that the Agreement constituted a midterm modification and is thus unlawful under the National Labor Relations Act; and (3) that GBA properly terminated the Agreement by a letter written the day prior to the deposition of its president, a substantial period of time after the Complaint was filed.

MCA's Response may be summarized as follows:

1. The arguments relying upon federal labor law, and requiring interpretation of the underlying collective bargaining agreements, are preempted by Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, and lack merit even if this Court had jurisdiction.

2. The arguments regarding lack of notification to the Federal Mediation Service are preempted by the National Labor Relations Act, and lack merit even if this Court had jurisdiction.

3. The Court need not resolve the purported termination issue, because it is not essential for the Court to reach that issue to decide the Motions now before the Court.

We also suggest that the Court issue an Order to Show Cause regarding the imposition of sanctions on GBA's counsel for bad faith conduct in connection with these Motions, which have caused this Court to waste its valuable resources in reviewing contract defenses which are now implicitly acknowledged to lack merit, and to review legal defenses which are clearly preempted by applicable federal law. Counsel for GBA, as experienced counsel in the field of labor law, had actual knowledge at all material times that the contract defenses were frivolous, and the legal defenses asserted concerning the interpretation of the collective bargaining agreements are preempted by Section 301, and had actual knowledge that the NLRA defenses are preempted as well. Counsel for GBA also violated Rules of Professional Conduct, Rule 5-200(A) and (B) by failing to cite to this Court applicable controlling authority and thereby misleading this Court.

[p. 168] Having failed to litigate its legal defenses in the appropriate forums, and seeking to have this Court litigate defenses which counsel knows are preempted, counsel for GBA has engaged in conduct which should be subject to contempt sanctions by this Court under its inherent power to punish contemptuous conduct.

II. STATEMENT OF FACTS

MCA hereby incorporates the Statement of Facts included in its opening Points & Authorities in Support of Summary Adjudication.

II. ARGUMENT

A. GBA'S Claim That The Letter Agreement Is Unenforceable Is Preempted By Section 301(a) Of The Labor-Management Relations Act, 29 U.S.C. § 185(a) (LMRA §301").

Since California Courts do not have jurisdiction over federal labor disputes, which are preempted by federal law, this Court is presumably not familiar with those principles. We are attaching hereto, in the Appendix, summaries of the law of federal preemption copied from a treatise called THE DEVELOPING LABOR LAW. This treatise is the most authoritative in the field of labor law, and is edited by leading labor practitioners representing both management and unions. (GBA's lead counsel, George Tichy, is listed as one of the editors of the 1995 Supplement to this treatise.) We urge the Court to review that treatise, to the extent it deems it appropriate. However, we do not believe the Court needs to devote extensive time to that summary, because the law is clear that

GBA's contentions based on the collective bargaining agreements and the notice provisions of the NLRA are both preempted by federal law and may not be adjudicated in state courts.

LMRA §301 serves "as a Congressional mandate to the federal courts to fashion a body of common law to be used to address disputes arising out of labor contracts." *IBEW v. Hechler,* 481 U.S. 851, 856 (quoting *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202). The uniform application of federal law to labor contracts is central to our national labor policy because "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 103-4 (1962).

[p. 169] In order to insure the uniformity of labor policy, the courts have applied the doctrine of federal preemption, and have ruled that:

> "[I]f the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results because there are as many state-law principles as there are States) is preempted . . . "

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 403-06 (1978).

When interpretation of "contracts between an employer and a labor organization" is required, claims are completely preempted under LMRA §301. See *Lingle, supra,* 486 U.S. at 403-06 (1978); *Allis-Chalmers Corp.,*

supra, 471 U.S. at 213, 220 (1985); *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 997 (9th Cir. 1987). "To determine whether a state law claim is completely preempted under section 301, the relevant inquiry is whether resolution of the claim required the interpretation of a collective bargaining agreement" *Hayden v. Reikerd*, 957 F.2d 1506, 1509 (9th Cir. 1992).

This is true even when a violation of the labor agreement has not been claimed. For example, in *Bale v. General Telephone Company*, 795 F.2d 775 (9th Cir. 1986) the plaintiffs were not claiming that the labor contract had been violated, but their claim was still held to be preempted.

> "In order to prove their fraud and negligent misrepresentation claims, [the plaintiffs] would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made. Resolution of their state law claims is therefore 'substantially dependent on an analysis of the terms of an agreement made between the parties in a labor contract.' "

Bale, supra, 795 F.2d at 780 (quoting *Allis-Chalmers Corp., supra*, 471 U.S. 202). Thus, the accepted test for LMRA §301 preemption is whether the claim will require **interpretation** of a labor contract, not the characterization or nature of the claim. Under this test, preemption should be equally applicable to a **defense** which involves interpretation of a labor contract as to **a claim** which involves its interpretation. This conclusion is also supported by the fact that, to insure the uniform interpretation of labor contracts under federal law, LMRA §301 "has been

accorded unusual preemptive power." *Livadas v. Bradshaw*, 512 U.S. 107, 114 S.Ct. 2068, 2077.

[p. 170] GBA's argument that the Agreement is invalid because it violates a provision of the Master Labor Agreements falls within the area of preemption. A determination of the merits of this argument would be "substantially dependent on an analysis of the terms of an agreement made between the parties in a labor contract." (*Allis-Chalmers Corp.* 471 U.S. at 220), since it would require an analysis of the provision which GBA claims makes the Agreement unenforceable. According to the Supreme Court, LMRA §301 preemption is to be applied "to assure that the purposes animating section 301 will be frustrated neither by state laws purporting to determine 'questions relating to what the parties to a labor agreement agreed, and what the legal consequences were intended to flow from breaches of that agreement.' " *Livadas, supra*, 512 U.S. 107, 114 S.Ct. 2068 at 2078 (June 13, 1994) (quoting *Allis-Chalmers Corp., supra*).

GBA's argument regarding whether the Local 467 collective bargaining agreement executed in July 1994 superceded the Agreement fails for the same reason; it requires interpretation of the labor contract and is therefore preempted.[1]

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[1] Because the Agreement sought to be enforced by MCA does not require **interpretation** of collective bargaining agreements for its enforcement, it is not necessary for the Court to reach any issues of federal law in order to enforce the Agreement. As GBA acknowledges, that is a "private agreement" between two employer associations, and said Agreement can be enforced without any interpretation of the

The "remedy" GBA seeks, that this Court deny the enforceability of the Agreement and dismiss MCA's claims as a result of the alleged violations of federal law, is also preempted by §301. There is exclusive federal jurisdiction over determination of the remedies available for violations of the NLRA, "because 'the range and nature of those remedies that are and are not available is a fundamental part' of the comprehensive system established by Congress." *Wisconsin Department of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282, 287 (1986) (quoting *Building Trades Council (San Diego) v. Garmon*, 353 U.S. 26 ((1957)).

If GBA had in good faith intended to assert these labor law defenses, then it should have removed this action to federal court, or filed a separate federal action, in order that the federal courts could apply the controlling federal principles which must be analyzed in order to evaluate [p. 171] GBA's defenses. Having failed to invoke the jurisdiction of the federal court, GBA may not now assert those defenses because of preemption.

Although this Court need not reach the merits of the federal issues, since they are preempted, we will suggest to the Court that the reason GBA's counsel elected not to remove this case to federal court, and assert their arguments involving interpretation of the collective bargaining agreements in the appropriate and exclusive forum, is because the U.S. District Court to which the action would have been removed is bound to follow the law of the

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collective bargaining agreements. Accordingly, GBA's contention that said Agreement is unlawful under federal law and thus under C.C. §§ 1608 and 1667 lacks merit.

Ninth Circuit, and the Ninth Circuit law is contrary to that relied upon by GBA. In fact, the very case cited and relied upon by GBA, and attached as Exhibit 2 to its authority from other jurisdictions, expressly acknowledges that the rule adopted in *Martinsville Nylon Employees v. NLRB* (D.C. Cir. 1992) 969 F.2d 1263, etc., by the Court of Appeals for the District of Columbia Circuit is **not** the same rule which applies in the Ninth Circuit. See *Martinsville* at page 6 where the opinion acknowledges that the Ninth Circuit in *Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996*, 597 F.2d 1269 (9th Cir. 1979) had stated that:

> " . . . overriding a no-oral-modification clause in a CBA "effectuates the federal policy of maintaining 'industrial peace.' It encourages resolution of labor disputes by negotiation rather than by the economic pressure of a strike.
>
> * * *
>
> (We note that no other circuit has had occasion to hold one way or the other on the status of a no-oral-modification clause.)"

Id. at 1276. Accordingly, contrary to GBA's argument, the two federal circuits which have addressed this issue have issued conflicting decisions, but the controlling law of the Ninth Circuit does not support GBA's position.

There is another possible reason why GBA did not seek to remove this case to federal court and make its arguments in a forum having jurisdiction. GBA counsel undoubtedly recognizes that the policy issues involved in the "oral" modification of a CBA involves the difficult issue as to whether a union, as the collective bargaining agent of employees in an appropriate bargaining unit,

should be permitted to modify a "mandatory bargaining subject" which affects the employees' significant substantive rights to wages, benefits and working conditions by oral agreement or other conduct which reflects less than careful deliberation and [p. 172] analysis. Moreover, it is obvious that permitting oral modifications which affect employee rights could easily result in collusion between union officials and employers. Accordingly, the policy of the *Martinsville* court to prohibit such oral modifications has a sound basis in federal labor policy, **where employee rights are at stake.** In this case, on the other hand, no employee rights are at stake. It is only which **employer association** shall be entitled to receive contributions paid by signatory contractors that is at stake in this case. The provisions providing for employer trust contributions or contract administration funds have been held to be "permissive" subjects of bargaining, thus the federal labor policy recognizes that they are of a totally different type of clause than those affecting the substantive rights of employees. Accordingly, if the federal courts were presented with this issue, there is no reason why federal labor policy should prohibit two employer associations from agreeing that a signatory contractor can switch from one to the other, and there is no reason why a union should be required to consent to such a transfer in writing. In this case both unions advised both associations of their policies – that it was strictly a matter for the contractors and their associations as to which association was to represent the contractors. There is no policy reason, under those circumstances, why the union should be required to consent in writing, when the contractors and

employer associations have confirmed their agreement by an appropriate writing.

B. GBA's Argument That The Letter Agreement Violates The Notice Requirements Of Section 8(d) Of The National Labor Relations Act ("NLRA") Is Preempted By The Exclusive Jurisdiction of the National Labor Relations Board ("NLRB").

The NLRB has primary jurisdiction over claims that arise under §8 of the NLRA.

> "It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board . . . . When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with National policy is to be averted."

Building Trades Council (San Diego) v. Garmon, 359 U.S. 236, 244-45 (1959).

GBA contends that the Agreement is invalid because the parties did not comply with the notice requirements of NLRA §8(d). This claim is within the **exclusive** jurisdiction of the [p. 173] NLRB, and not the state courts, since it is regarding an activity (giving notice) that is within section 8.[2]

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[2] Although the Court need not address this issue, since it is preempted, we do think it appropriate to point out that the substantive contention of GBA lacks merit. As noted in THE DEVELOPING LABOR LAW, 1995 Cumulative Supplement,

C. The Fact That GBA Terminated The Letter Agreement On May 16, 1996 Does Not Prevent MCA From Recovering Damages For Breach Prior To The Termination

This Court need not reach the termination issue on these Motions. GBA's position regarding its "termination" effectively seeks an advisory opinion. All of the contractors who elected to transfer from GBA to MCA did so substantially prior to the purported notice of termination. Accordingly, no substantive rights are at stake in this case which are dependent on the effectiveness of that termination.

In *Ravel v. Hubbard*, 112 Cal.App.2d 255, 249, the court awarded damages for breach prior to termination. Moreover, California law is clear that a contract of indefinite duration is valid and enforceable for a "reasonable" period of time. What is "reasonable" is largely a factual matter requiring development of all of the surrounding circumstances. If, in the future, a GBA contractor seeks to transfer to MCA on the authority of the Agreement, the parties and courts could then address whether said contractors should be authorized to transfer, or whether GBA's purported termination notice effectively barred

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attached in Appendix, the NLRB and federal courts have held that there is no need to serve a section 8(d) notice in cases of midterm renegotiation. Rather, the courts and Board have held that section 8(d) "applies to termination or modification of a [CBA] taking place after the natural expiration of the labor contract." *NLRB v. Graphic Communications Local 554 (World Color Press)*, 991 F.2d 1302 (CA 7, 1993), *enforcing* 306 NLRB 844 (1992). Accordingly, even if this Court had jurisdiction over the issue, GBA's position would lack merit.

such a transfer. Those issues need not be addressed by the Court at this time.

Dated: December 2, 1996

Respectfully Submitted,

CARTER & CARTER

By: /s/ James A. Carter
James A. Carter
Attorney for Plaintiff

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA

[p. 174] **PROOF OF SERVICE**
BY HAND DELIVERY (VIA MESSENGER)

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is: 425 California Street, 19th Floor, San Francisco, California 94104.

On December 2, 1996, I served the attached:

1. PLAINTIFF'S SEPARATE STATEMENT OF DISPUTED FACTS IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES

2. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES

3. APPENDIX OF AUTHORITY FROM OTHER JURISDICTIONS CITED IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES

On the interested parties in the within action by personally delivering (via messenger) a true copy thereof at the following address:

Mr. Daniel Croley
Littler, Mendelsohn et al
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 2, 1996.

/s/ Michelle Q. Carter
Michelle Q. Carter

[p. 175] **EXHIBIT D**

JAMES A. CARTER (CBN 33119)
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OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA'S REPLY TO DEFENDANT'S OPPOSITION MEMORANDUM TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION Date: Jan. 7, 1997 Time: 9 a.m. Dept.: 8 – Law and Motion Judge: The Honorable Mark C. Forcum

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MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA'S REPLY TO DEFENDANT'S OPPOSITION MEMORANDUM TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION Date: Jan. 7, 1997 Time: 9 a.m. Dept.: 8 – Law and Motion Judge: The Honorable Mark G. Forcum

I. INTRODUCTION

In its opposition papers Defendant ("GBA") has dropped all pretense that the Letter Agreement of January 7, 1994 ("1994 Agreement"), is unenforceable for lack of consideration or that it applied only to future labor contracts. GBA's sole defense now is that, after GBA duly executed the 1994 Agreement, (without requesting or suggesting that it be forwarded to the Unions for execution), received and cashed the $5,000 check specified therein, and received contributions from Egan Plumbing which was transferred from Plaintiff ("MCA") to GBA in [p. 180] reliance on the 1994 Agreement, that Agreement should not be enforced by the Court because of asserted illegality based on GBA's (erroneous) interpretation of federal law.

GBA's Brief relies on a combination of California law and federal law, without a clear differentiation as to which law controls. We will now show that, regardless of whether California or federal law controls, MCA's motion has merit, and GBA's defenses lack merit.

A. If California law controls, GBA's defenses lack merit because its reliance on the purported illegality of the 1994 Agreement cannot satisfy California criteria. This analysis is set forth in Part A below.

B. MCA believes that the correct "choice of law" is that California law governs the 1994 Agreement, because that Agreement does not require "interpretation" of the CBA's. On the other hand, GBA's purported defenses, relying solely on federal law, are dependent on interpretation of the CBA's, thus those defenses are preempted

by Section 301. Under Section 301 this Court has concurrent jurisdiction, but must apply controlling federal law. Controlling federal law is established by the Ninth Circuit, and that law would **not** render the 1994 Agreement unenforceable because it was not signed by the two Unions. This analysis is set forth in Part B below.

C. GBA argues that the 1994 Agreement is unenforceable because the parties failed to give the notice required by Section 8(d) of the NLRA. This argument lacks merit because a violation of 8(d) is solely an unfair labor practice which must be remedied by an Order of the NLRB. A contract negotiated without giving an 8(d) notice is not thereby rendered unenforceable. This analysis is set forth in Part C below.

D. GBA argues that the 1994 Agreement was overturned by a later 1994 negotiation and extension of the Local 467 contract. GBA's analysis is wrong. Moreover, federal law preempts this Court from addressing that issue because GBA was obligated, under the Local 467 CBA, to take that matter to the grievance arbitration procedure set forth in the contract. This analysis is set forth in Part D below.

[p. 181] II. ARGUMENT

A. The 1994 Agreement Is Governed Solely By California Law

To the extent that GBA relies on California law concerning the asserted defense that the 1994 Agreement is not enforceable because of purported "federal" illegality,

we call the Court's attention to *Witkin, Summary of California Law, Ninth Edition, CONTRACTS,* Sections 429 and 430, where *Witkin* summarizes California authorities for the proposition that illegal contracts require illegal consideration (not present in this case) or an illegal object (also not present in this case). GBA asks this Court to create a "new" provision of California law, not previously recognized in this state, by creating a new "remedy" based upon conduct which GBA contends violates solely **procedural** federal laws. This Court should reject GBA's efforts to supplant the remedies provided by federal law with a new state remedy which has never been sustained by any federal or California court.

GBA asserts that the 1994 Agreement is void under Civil Code Sections 1608 and 1667, but cites no authority for that proposition. Obviously, there is no such authority. There is no 1608 violation because the consideration for the 1994 Agreement was lawful. There is no Section 1667 violation because the 1994 Agreement is not contrary to an express provision of law, contrary to the policy of express law, not contrary to good morals.

GBA seeks to rely on Civil Code Section 1698(c), but any such reliance is misplaced since modification of a CBA clearly is governed by federal law. That controlling federal law concerning oral modification of a CBA is contrary to GBA's position.

GBA's reliance on the Parol Evidence Rule sets up a "straw man," quite aside from the fact that those issues are governed by federal, not California, law. MCA does not contend that the "Unions are ostensibly parties to the 1994 Agreement." (Brief, page 2, line 11) On the contrary,

MCA's position is that the Unions are **not** parties to the 1994 Agreement, because the Unions' own "policies" as communicated to both MCA and GBA provided that the Unions did not wish to be parties to any such Agreement, but would accept written agreements signed by the employers. Accordingly, MCA does not seek to apply the Parol Evidence Rule but relies on the enforceability of the 1994 Agreement as written.

[p. 182] GBA argues that preemption does not apply: " . . . because the court need not interpret the underlying CBA's to resolve this matter; . . . " (Brief, page 2, lines 25-26) GBA goes on to argue that both MCA's effort to enforce the 1994 Agreement and GBA's defenses to that Agreement equally involve preemption because both " . . . derive from the same 1994 Agreement and CBA's." (Brief, page 3, lines 2-3) GBA's analysis is flawed. In order for the Court to enforce the 1994 Agreement, it is not necessary for the Court to interpret the CBA's. As GBA earlier acknowledged, the 1994 Agreement is a "private agreement" between two Employer Associations, governing the authority of their respective members to switch from one Association to the other. On the other hand, GBA's argument that the CBA's cannot be modified orally requires the Court to interpret the CBA's. In fact, GBA implicitly recognizes the weakness of this position by asserting as a fallback position that the Court really need not "interpret" the CBA's because it can rely on "undisputed facts" submitted by the parties in accordance with the California Rules of Court. If avoidance of preemption could be accomplished through state procedural rules, the states would have the capacity to effectively negate

the uniformity which is a major purpose of federal preemption. Federal preemption is a matter of substantive law while the rules governing motions for summary adjudication are state procedural rules designed to assist the Court by requiring the parties to designate disputed and undisputed facts. Where those facts, whether disputed or undisputed, require the Court to apply legal principles to "interpret" a CBA, then preemption applies. As noted in *Allis Chalmers Corporation v. Lueck,* 471 U.S. 202 (1985), (attached as Exhibit 1 to GBA's Appendix of Authorities submitted in conjunction with its opposition):

> "Because the right asserted not only derives from the contract, but is defined by the contractual obligation . . . , any attempt to assess liability here inevitably will involve contract interpretation. . . . Congress has mandated that federal law govern the meaning given contract terms. Since the state [law] purports to give life to these terms in a different environment, it is preempted." (Exhibit 1 at page 96)

It should require no argument or analysis that preemption is not determined by whether the case involves a "right" or a "defense." If the Court is called upon to interpret a Collective Bargaining Agreement, then the action is preempted, and governed solely by federal law.

[p. 183] GBA's own Brief substantiates the distinction between MCA's efforts to enforce the 1994 Agreement, which does not require the Court to interpret the CBA's, with GBA's defenses, which do require such "interpretation." See GBA's Brief at page 11, commencing at line 24. The operative distinction is a "reference" to a CBA, which

does not cause preemption, as distinguished from "interpretation," which does cause preemption. Enforcement of the 1994 Agreement does require reference to the CBA's because they set forth the contribution rate to be paid by the affected contractors. On the contrary, GBA's defenses do not permit a mere reference, but require the Court to "interpret" the CBA's in connection with the legal effect flowing from midterm re-openers, integration, and duration. The degree of "interpretation" contemplated by GBA's defenses is illustrated in its Brief at page 12 where it makes reference to the various "undisputed facts" which themselves involved interpretation of the CBA's, and its Brief where it summarizes the relevant **Terms Of The Collective Bargaining Agreements.** (Brief, pages 3-4) That argument completely undermines GBA's position that there is no preemption because the Court is not called upon to "interpret" the CBA's.

To the extent GBA tries to effect a "marriage" of California law and federal law, by invoking both Section 1667 and Section 8(d), GBA's position lacks merit. *Kaiser Steel Corp. V. Mullins* (1982) 455 U.S. 72, cited by GBA at Brief, page 12, lines 25, et seq., is inapposite to this case because the contract provision at issue in *Kaiser Steel Corp.* violated Section 8(e) of the NLRA which expressly provides that a contract in violation of that section is "null and void." The Court in *Kaiser* held, correctly so, that the courts could not enforce a contract provision which the NLRA had declared to be "null and void." On the contrary, there is no similar provision that failure to serve a notice under Section 8(d) renders the underlying contract "null and void." Rather, violation of the Section 8(d) notice provision simply constitutes an unfair labor

practice which can be remedied solely by an NLRB Order to bargain in good faith. This is to be contrasted with Section 8(e) which provides both that "it shall be an unfair labor practice" to enter into an agreement containing a hot-cargo clause, but also that: "Any contract or agreement entered into heretofore or hereafter containing [a hot-cargo clause] shall be to such extent unenforceable and void."

[p. 184] **B. Controlling Federal Law Permits Oral Modification of a CBA.**

GBA argues that this Court should elect to follow federal decisions prohibiting oral modifications, and implicitly asks that the Court **not** follow the controlling case in the Ninth Circuit which does not prohibit such oral modifications. In this argument GBA seems to assume that this Court is free to select among competing federal decisions. It is interesting that GBA has cited no federal or California authority for the proposition that this Court may select among competing federal circuits, when there is a definitive decision of the Ninth Circuit directly on point. It is MCA's position that the courts of California are obligated to follow the established law of the Ninth Circuit, just as a federal district court in California would be obligated to follow the law of the Ninth Circuit. However, as we show below, all of the federal courts which have addressed whether CBA's can be modified orally have rested their decision on policy grounds. For reasons set forth below, we believe the federal courts would find that there is no policy reason to prohibit oral modifications of the kind involved in this dispute.

A review of the language quoted in GBA's brief on page 6 shows that the policy of forbidding "oral modification" is to avoid industrial strife, particularly where there may be conflicting memory regarding the alleged oral modification. Here, of course, that policy reason is not present because the 1994 Agreement is in writing as between the parties most interested in its enforcement – MCA and GBA. The Unions were not asked to become party to the 1994 Agreement because both GBA and MCA knew of the Unions' policies – which were to permit transfer of contractors from one Association to the other so long as the employers had agreed in writing. GBA cites no authority, nor any persuasive argument, as to why a Union may not waive rights under the unique circumstances of this case.

Since it cannot be disputed that federal law controls all issues related to the Collective Bargaining Agreements and their modification, it is a duty of this Court to follow established federal law, or to fashion a decision which the Court believes is most consistent with federal law. Since the record is clear that MCA and GBA both voluntarily negotiated, executed and initially implemented the 1994 Agreement, and since that Agreement was consistent with the policy of both of the affected Unions, there is simply no principle of federal labor law which would [p. 185] preclude enforcement of that Agreement as between MCA and GBA. In fact, it could be argued that refusal to enforce the 1994 Agreement would be more productive of industrial strife, because forcing a contractor to be represented by an Association which has lost that contractor's confidence is more likely to lead to labor problems than

permitting the contractor to be represented by the Association which the contractor believes will best serve that contractor's interests in dealing with the affected Unions. Both of the Unions obviously subscribe to that principle, because they were willing to permit contractors to switch Associations and be represented by the Association of the contractor's choosing, provided only that the contractor signify that desire in a writing.

GBA's Footnote No. 4 (P&A page 6) implicitly supports MCA's position. Both Local Unions were contacted because they do have an interest in signatory contractors' representation. As GBA notes, contract administration funds paid under the CBA's are the equivalent of Union dues – funds paid for the purpose of obtaining proper representation in the labor relations field. It seems obvious that both Unions deemed the Unions' best interests, and the best interests of their members, to be best served if the contractors are represented by bargaining agents of their choosing. Enforcement of the 1994 Agreement serves that purpose. On the contrary, if the Court were to deny enforcement of the 1994 Agreement, it would effectively force signatory contractors to continue to be represented by an "unwanted" Association. The Unions obviously prefer to have contractors represented by an Association of their own choosing, and to leave that selection process solely to employers. No labor policy would be served by forcing the Unions to become involved in that selection process when the Unions wish to remain outside the process.

C. This Court Lacks Jurisdiction to Grant Remedies for Violation of the Notice Requirements of Federal Labor Law.

GBA's argument concerning the notice requirement under Section 8(d) of the NLRA is based on two propositions: First, that the 1994 Agreement was a "midterm modification" which [p. 186] required that notice be given under Section 8(d);[1] secondly, since no such notice was given, the 1994 Agreement may not be enforced. GBA is wrong on both propositions.

GBA attempts to distinguish *World Color Press* on the basis that the parties there sat down to renegotiate a contract, while here the parties never sat down to formal renegotiations. GBA is accurate that the parties never sat down to renegotiate, but only because both of the Unions had previously advised both MCA and GBA that the Unions did not desire to sit down in any such renegotiations. Both Unions informed both Associations of their "policy" whereby they would authorize a contractor to switch from one Association to the other, provided the contractor specified in writing that it wished to switch and the two Associations agreed with that switch. Since the 1994 Agreement was in compliance with the "policy"

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[1] Federal courts have held that there is no need to serve a section 8(d) notice in cases of midterm renegotiation. Rather, the courts and Board have held that section 8(d) "applies to termination or modification of a [CBA] taking place after the natural expiration of the labor contract." *NLRB v. Graphic Communications Local 554 (World Color Press)*, 991 F.2d 1302 (CA 7, 1993), *enforcing* 306 NLRB 844 (1992). Accordingly, even if this Court had jurisdiction over the issue, GBA's position would lack merit.

of both of the Unions, there was no reason for the Unions to come into those negotiations.

The Declaration of Gary Sanders, Business Manager of U.A. Local 467, is attached as Exhibit 4 to the Declaration of Brian Carter filed on October 28, 1996. Sanders states in paragraph 3 thereof that it was the "policy" of Local 467 that signatory contractors could change from representation by either MCA or GBA so long as the requested change was " . . . in writing by the contractor and approved by both MCA and GBA; (B) it has never been the policy of this Union that we wish to negotiate or bargain regarding such a transfer of a signatory employer from one association to the other, nor has this Local Union ever stated that it would need to approve any such transfer in writing."

The Declaration of Lloyd Williams, Business Manager of U.A. Local 393, is attached as Exhibit 5 to the Declaration of Brian Carter, referred to above. The "policy" adopted by Local 393 is substantially identical to that set forth in the quoted language from the Sanders Declaration.

[p. 187] Paragraph 4 of the Declarations of Sanders and Williams states that: "Officers and representatives of both MCA and GBA have been advised of the policy set forth in paragraph 3 above."

Moreover, even assuming, *arguendo,* that a notice should have been given, failure to provide that notice is solely an unfair labor practice which must be remedied by the NLRB and which may not give rise to a remedy to be provided by the courts. In *Procter & Gamble Ind. U. v. Procter & Gamble Mfg. Co.,* 312 F.2d 181 (1962), the Court

discussed the history and purpose of Section 8(d) notices and stated:

> "It becomes clear on reading the Section as a whole that its purpose is to provide for a waiting period during which there can be no strike." (312 F.2d at 188).

The Court in *Procter & Gamble* then discussed various U.S. Supreme Court decisions regarding preemption and exclusive jurisdiction, and held that Section 8(d):

> " . . . does not suggest that failure to comply will constitute a breach of contract, or that the courts are authorized to take over the function of the Board . . . Failure to comply is an unfair labor practice which the Board may redress by a proper order.
>
> The passage from the Lucas case which is quoted above indicates that the courts are to administer contract remedies and the Board is to administer the remedies provided under the Act." (312 F.2d at 188-189)

Section 8(d) concerns the duty to bargain in good faith, a subject wholly within the expertise of the NLRB. Failure to give the notice specified therein constitutes an unfair labor practice which may be remedied by an appropriate Board order. As we have shown, the Board would not have deemed the 1994 Agreement as being subject to the 8(d) notice requirements and would not have granted a remedy because it was a midterm modification. GBA now asks this Court to grant a remedy which is beyond the Court's jurisdiction because it is solely within the exclusive jurisdiction of the Board, and

to find the 1994 Agreement to be unlawful and unenforceable, a remedy the Board would not have granted.

D. GBA Was Required to Arbitrate Its Contentions Concerning the Effect of the 1994 Extension.

GBA's next argument, that the "extension" of the Local 467 Agreement after MCA and GBA had executed the 1994 Agreement, supersedes and makes unenforceable the 1994 Agreement, implicitly requires the Court to "interpret" the CBA, because GBA asks the Court to [p. 188] find that the "integration" provisions of the new 467 Agreement render null and void the earlier 1994 Agreement.

If this Court decides to "interpret" the Local 467 CBA, it should find that the 1994 Agreement is not superseded because a "private agreement" between MCA and GBA is not covered by the "integration" clause. However, the Court need not reach that issue because the Local 467 CBA required that all disputes arising thereunder be resolved by final and binding arbitration. GBA, by failing to seek arbitration of that issue, is foreclosed from arguing its "interpretation" to this Court. The *Allis Chalmers* case, *supra*, (Exhibit 1 at page 97) supports preemption of this defense asserted by GBA because it attempts to bypass the mandated grievance arbitration procedure set forth in the Union contract. The Court stated:

> "A final reason for holding that Congress intended Section 301 to preempt this kind of . . . claim is that only that result preserves the central role of arbitration in our 'system of industrial self-government.' "

The CBA between GBA and Local 467 is attached as Exhibit A to the Declaration of Barbara Cunningham, attached as Exhibit 1 to GBA's papers filed on November 13, 1996. That CBA provides, commencing on page 8, for a Joint Conference Board ("JCB") which has sole and exclusive jurisdiction to consider and settle any and all disputes between GBA and Local 467. Specifically, Section 38 sets forth the parties' intent to settle any disputes which may arise. Section 40.C makes clear that the JCB is entitled: "to hear and adjust disputes, complaints and grievances between the Union and any Employer Association party hereto or any Individual Employer involving the interpretation of enforcement of this Agreement." Paragraph 44 provides that the decision of the JCB " . . . shall be final and binding upon the parties." Section 48 provides that: "No dispute, complaint or grievance which is not called to the attention of the Union . . . by the referring party within thirty days of the occurrence giving rise to the same, shall be recognized by the Joint Conference Board."

The foregoing provisions of the CBA clearly required that GBA's contention that the 1994 Agreement did not survive the renegotiation of the Local 467 Agreement in July 1994 should have been called to the attention of the Union and adjudicated under the CBA. If GBA, as a signatory party to the 1994 Agreement, believed that said 1994 Agreement did not survive [p. 189] the "integration" language of the renegotiated Local 467 CBA, it should have called that fact to the attention of Local 467 at the time that extended CBA was negotiated. Alternatively, GBA may have been authorized to take the action of

filing a grievance as late as the date that Design Mechanical and R. L. Peterson signified their desire to cease being represented by GBA and commence being represented by MCA. If at that time GBA intended to take the position that the transfers were prohibited because the 1994 Agreement was inconsistent with the renegotiated CBA, then GBA was obligated to file a grievance under the CBA. Having failed to do so, GBA may not now ask this Court to invade the exclusive province of the JCB by adjudicating that grievance in GBA's favor. Permitting the Court to substitute its "interpretation" under the circumstances of this case would undermine the federal policy of encouraging resolution of disputes arising under CBA's solely through their own procedures.

III. CONCLUSION

For all of the foregoing reasons Plaintiff MCA respectfully requests that the Court grant a summary adjudication in its favor and against GBA.

Respectfully submitted,

CARTER & CARTER

By: /s/ James A. Carter
James A. Carter
Attorney for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA

Dated: December 30, 1996

[p. 190] **PROOF OF SERVICE**
BY U.S. MAIL

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is:

425 California Street, 19th Floor, San Francisco, California 94104.

I am readily familiar with my employer's practices for collection and processing of correspondence for mailing with the United States Postal Service.

On December 30, 1996, I served the attached:

1. **PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA'S REPLY TO DEFENDANT'S OPPOSITION MEMORANDUM TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION**
2. **APPENDIX OF AUTHORITY FROM OTHER JURISDICTIONS CITED IN SUPPORT OF PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION MEMORANDUM TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION**

on the interested parties in the within action by placing a true copy (copies) of same enclosed in a sealed envelope with postage fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Mr. Daniel Croley
Littler, Mendelsohn et al
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 30, 1996.

/s/ Michelle Q. Carter
Michelle Q. Carter

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IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. **GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation,** Defendant.	**Case No. 394184** **DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.'S TRIAL BRIEF (Filed Mar. 18, 1997)** **Trial Date: March 17, 1997** **Time: 9:00 a.m.** **Dept. The Presiding Judge**

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[p. 196] **I. INTRODUCTION AND STATEMENTS OF FACTS**

This is a breach of contract case which was brought by Plaintiff Mechanical Contractors Association Of Northern California ("Plaintiff" or "MCA") against Defendant Greater Bay Area Association of Plumbing-Heating-Cooling Contractors Association of Greater Bay Area, Inc. ("GBA").[1] The legal issue in this case is whether an Agreement entered into between MCA and GBA is valid and enforceable. (*See* Croley Decl., at ¶¶2-3.)

GBA and MCA are parties to separate collective bargaining agreements ("CBAs") with various unions, and their respective members who are signatory contractors are also subject to those CBAs. (DUMF 1, 2; PUMF 1; Complaint ("Compl."), at ¶5.)

Under the CBAs, contract administration and industry funds are earned by and paid to the respective associations for all work performed by union members employed by the association's signatory contractors. The

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[1] Both parties are associations composed of various employers; both associations negotiate collective bargaining agreements with unions on behalf of the Associations' members. The Associations earn contract administration funds ("CAF's"), pursuant to the collective bargaining agreements ("CBA's"), for hour worked by their members' employees. (*See* GBA's Separate Statement of Undisputed Material Facts (hereinafter referred to as "DUMF ___"), *attached as* Exhibit A to Declaration of Daniel A. Croley In Support of Motion In Limine ("Croley Decl."), at DUMF 1, 2, 3. *See also,* MCA's Separate Statement of Undisputed Material Facts (hereinafter referred to as "PUMF ___"), *attached as* Exhibit B to Croley Decl., at PUMF 1, 2.)

CBAs may be modified only by a writing signed by an authorized representative of every party to the CBAs. (DUMF 3; PUMF 2; Compl., at 5.)

A. The Private 1994 Contract Between MCA and GBA.

In 1993, a dispute arose between MCA and GBA regarding contractors moving from GBA to MCA during midterm of the CBAs. (DUMF 5, 7, 8; Compl., at ¶6.) In an effort to resolve this dispute, GBA and MCA agreed, in writing, as follows: (1) MCA would give GBA $5,000 if GBA assigned to MCA GBA's right to recoup its $5,000 in "seed money" from CPMCA; (2) the disputes between MCA and GBA were deemed resolved; and (3) to avoid such disputes in the future, both associations agreed that their members could switch associations by giving written notice to both associations and that "funds" which were earned after the effective date of the association change would be paid to the member's new association. (DUMF 9-10; Compl., at ¶¶7-8, 11.)

[p. 197] Assuming that the January 7, 1994 letter is an agreement between GBA and MCA, it constitutes a midterm modification of the applicable CBAs. (PUMF 4, 6.) MCA also agrees that the concerned Unions never agreed to, or waived their right to agree to, this modification in a writing signed by duly authorized Union representatives.[2] According to MCA, the Unions impliedly or orally

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[2] MCA has argued that the Unions have essentially provided the requisite "writing" when submitting declarations in support of MCA's motion for summary judgment (PUMF 5,

agreed to whatever modifications were decided upon by MCA and GBA. (*See* Compl, at ¶¶9-10.) Thus, according to MCA itself, no duly authorized Union representative ever consented in writing to a modification of the CBAs. Furthermore, no notice was given to any state or federal mediation agency concerning this modification. (PUMF 8.)

B. Events After the 1994 Letter.

MCA, GBA and Local 467 agreed to a "memorandum of understanding" by which they extended and modified the Local 467 Agreement. (PUMF 10.) The memorandum of understanding was effective *July 1, 1994, nearly six (6) months after the date of the 1994 Agreement.* The Local 467 Agreement contained the following integration clause:

> This agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the

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20) MCA's argument is dubious at best and deliberately misleading at worst. First, MCA's Complaint flatly states that the Unions orally waived their right to object to or consent to a contract modification. (*See* Compl., at ¶¶9-10, stating that the unions repeatedly "stated" to MCA that they would agree to whatever the two parties decided; DUMF 12.) Second, an after-the-fact declaration does not constitute a contemporaneous "writing". It is merely a regurgitation of what happened; and what happened is, by MCA's own words, only an oral waiver. MCA cannot reinvent the past through litigation documents prepared in the present and its attempt to do so reflects its desperation in this matter.

> parties shall be bound by or liable for, any statement, representation, promise, inducement or agreement not set forth herein.

(PUMF 11.) When MCA and GBA extended their CBA with Local 467, the 1994 Agreement was not incorporated into the respective CBAs. (PUMF 12.)

In May 1996, GBA sent a letter to MCA which stated: "GBA hereby terminates that agreement effective immediately or at the earliest possible date allowed by law, whichever date occurs first." (PUMF 13.) The termination letter was sent with Return Receipt Requested. The return [p. 198] receipt was provided and indicated that MCA, on May 17, 1996, received the termination letter. (PUMF 14.)

II. LEGAL ARGUMENT

A. The Agreement At Issue In This Case Is Not Valid or Enforceable As A Matter Of Law.

1. Because The CBAs Prohibit Oral Modifications, The Unions' Oral Agreements Or Waivers Cannot Modify The CBAs.

Courts strictly honor and enforce "no oral modification" and complete agreement/integration clauses appearing in collective bargaining agreements. *Martinsville Nylon Employees v. NLRB* (D.C. Cir. 1992) 969 F.2d 1263, 140 L.R.R.M. 2873, 2875-76. The *Martinsville* court held collective bargaining agreements that expressly prohibit oral changes may not be modified orally under *any* circumstances. *Id.* at 1265-68. This is a *per se* rule, which would invalidate any oral agreement. The *Martinsville* court, thus, rejected an old common law rule permitting

oral modifications of contracts that expressly prohibit them. *Id.*

Here, the following facts are undisputed: (1) the 1994 Agreement allegedly modified the respective CBAs; (2) the CBAs may only be modified in a writing signed by duly authorized association and Union representatives[3]; and 3) and any agreement or waiver by the Unions concerning the 1994 Agreement was oral and not in writing. (PUMF 3, 4; DUMF 12; Compl., at ¶¶9-10.)

These facts are fatal to MCA's claim. *Martinsville's per se* rule renders the Unions' oral modification of the CBA ineffective and void as a matter of law. *Martinsville, supra,* 969 F.2d at 1265-68.

2. MCA's Legal Authority Is Outdated And A Legal Anomaly.

In response, MCA has argued that the Court is shackled to a Ninth Circuit decision, stating *in dictum* that a collective bargaining agreement that prohibits oral modifications can nonetheless be modified by an oral agreement, because it is the law of this circuit. (*See* MCA's [p. 199] Opposition Brief ("Opp."), *attached as* Exh. C to Croley Decl., at p. 6, *relying on Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996* (9th Cir. 1979) 597

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[3] The Master Labor Agreements explicitly state that any modification of the contracts must be in writing and given to the other parties of the CBA 60 days ahead of time. For example, the 467 CBA states that the agreement shall automatically continue unless one party provides written notice to the other of "its desire to amend . . . the Agreement." The 393 Agreement contains similar language.

F.2d 1269 (hereinafter referred to as "Hawaii Teamsters").) This Court is not shackled to *Hawaii Teamsters*.

Even if the proposition for which MCA cites *Hawaii Teamsters* is not *dicta*, this Court is not handcuffed by *Hawaii Teamsters* because there is a conflict among federal circuits on this issue. *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 879 (where there is a conflict in federal decisions, California courts are not bound by any one decision).

Rather, the Court should embrace the modern authorities which strictly prohibit oral modifications of written agreements if the agreements do *not* allow them. *Martinsville Nylon Employees v. NLRB* (D.C. Cir. 1992) 969 F.2d 1263. *Merk v. Jewel Food Stores* (7th Cir. 1991) 945 F.2d 889, 894 (prohibiting an oral, side agreement that modified a CBA under the Parol Evidence Rule); *Gatliff Coal Co. v. Cox* (6th Cir. 1945) 152 F.2d 52, 56, (holding the NLRA "clearly precluded . . . reliance upon a prior or contemporaneous oral agreement to modify the terms of the written collective bargaining agreement.")

There are several reasons why the Court should adopt *Martinsville* as the better-reasoned rule. First, "because the oral modification in *[Hawaiian Teamsters]* merely extended the duration of the CBA, and thus could be viewed as an independent oral contract, the court's opinion that the no-oral-modification clause was without effect was not strictly necessary to the result." *Martinsville*, 969 F.2d at 1267. Rather, *Hawaii Teamster's* "actual holding [was] that 'a collective bargaining agreement need not be in writing in order to be enforceable.' "

Martinsville, 969 F.2d at 1267. As such, the proposition for which MCA cites *Hawaii Teamsters* is *dicta*.

Second, *Martinsville* represents the position of the California Legislature. The Legislature has already enacted the modern rule as stated in *Martinsville* in Civil Code section 1698(c) which states, "*Unless the contract otherwise expressly provides*, a contract in writing may be modified by an oral agreement. Civ. Code § 1698(c). *See* NY Gen. Oblig.L. § 15-301(1) (same). Significantly, "the Uniform Commercial Code as enacted in *every state*, provides with respect to contracts for the sale of goods:"

[p. 200] because "the parties to a CBA, like 'merchants' within the meaning of UCC § 2-104, are sophisticated. Their agreement is a product of substantive negotiations between intensely interested parties, usually advised by specialized counsel. They ought not be presumed to have included in their agreement a meaningless provision against oral modifications. Nor is there any need to fear that either party may have missed the fine print or somehow been taken advantage of in agreeing that there shall be no oral modification." *Martinsville*, 969 F.2d at 1267.

Fifth, *Martinsville*, unlike *Hawaii Teamsters*, is not a legal anomaly but rather, is supported by other cases. *See e.g., Lewis v. Seanor Coal* (3rd Cir. 1967) 382 F.2d 437, 441-45 (parol evidence of oral modification to a written collective bargaining agreement are inadmissible), *cert. denied*, 390 U.S. 947 (1968); *Gatliff Coal, supra*, 152 F.2d at 56 (the NLRA "clearly precluded . . . reliance upon a prior or contemporaneous oral agreement to modify the terms of the written collective bargaining agreement."); *Wilkes Barre Printing Pressman and Assistants' Union v. Great*

Northern Press (M.D.Pa. 1981), 522 F. Supp. 106, 109. For example, the *Wilkes* case says:

> Once the existence of a binding contract has been established, [parol evidence offered to contradict the terms of a collective bargaining agreement] will be disallowed as part of a general policy to protect workers from collusive oral agreements between management and union leadership.

In addition, *Merk, supra,* which used the parol evidence rule to prohibit an oral, side agreement that modified a CBA, also addressed the dispositive issue in this case as follows:

> Section 8(d) of the National Labor Relations Act does not require collective bargaining agreements to be in writing *unless one of the parties requests that they be.*

Merk, supra, at 894 (*citing, Gatliff Coal, supra,* at 56) (emphasis added).

In short, *Martinsville,* unlike *Hawaii Teamsters,* does not stand alone. A handful of decisions strictly enforce prohibitions against oral modifications and those decisions overshadow *Hawaii Teamsters,* which is more than a generation old. Accordingly, the Court should adopt the modern view and find that an oral agreement is ineffective to modify a contract that expressly prohibits such oral changes.[5]

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[5] In its Reply papers, MCA's only response appears to be that general principles of contracts do not apply when collective bargaining agreements are involved. (MCA's Reply Brief,

[p. 201] **3. MCA's Remaining Arguments On The Modification Issue Are Equally Unpersuasive.**

Plaintiff asks the Court to ostensibly destroy the parties' promise against oral modifications because the Agreement modifies only the CBA provisions dealing with CAFs as opposed to, *inter alia*, employees' wages (Opp., at 7.) This argument, if accepted, would mean that that the prohibition against oral modifications would apply to some, but not all of the provisions of the CBAs. Worse, negotiators will *not* know in bargaining or administering the CBAs which provisions can be, or cannot be, orally modified notwithstanding the prohibition against *all* oral modifications. They will have to wait for a court to tell them, perhaps decades later, that their CBAs were modified by an oral, side agreement. These facts, taken together, demonstrate that the Unions could only modify the CBAs in writing; and their undisputed failure to do so renders their oral consent ineffective and the 1994 Agreement invalid. *Cf. Allis-Chalmers Corporation v. Lueck* (1985) 471 U.S. 202, 209-211 (emphasizing the importance of certainty in contractual relationships between labor and

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attached as Exh. D to Croley Decl., at 2-3.) MCA's argument is flatly wrong. "Collective bargaining agreements are governed by traditional rules of contract interpretation as long as their application is not inconsistent with federal labor policy." *Armistead v. Vernitron Corp.* (6th Cir. 1991) 944 F.2d 1287, 1295. In fact, courts have not hesitated to apply contract principles to CBAs. *See Lewis, supra,* 382 F.2d at 441-45 (parol evidence); *Wilkes, supra,* 522 F. Supp. at 109 (same); *International Union, United Auto., Aerospace, Agric. Implement Workers of America v. Yard-Man, Inc.* (6th Cir. 1993) (716 F.2d 1476, 1479 (same).

management in fashioning federal common law governing CBAs).

As the foregoing analysis makes clear, MCA's claim is fatally flawed and GBA respectfully requests that the Court enter judgment in its favor.

B. Even If An Oral Wavier Is Sufficient, MCA's Claim Is Meritless.

1. The Parol Evidence Rule Bars Admission Of The Alleged Oral Waivers By The Unions Because They Would Contradict The Terms Of The 1994 Agreement, Which Is A Partially Integrated Writing.

Whether the 1994 Agreement "is an integration is a question of law for the judge" to decide. *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 805. " 'The court shall [p. 202] determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein. . . . ' " *Id.* (*citing* Code Civ. Proc., § 1856, Subd. (d).)

An integrated agreement may appear in a variety of forms. *Id.*[6] When an agreement is partially integrated, "parol evidence is admissible only to prove an oral term

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[6] Illustrations of writings that are *not* final and complete expressions of an understanding are: minutes of a meeting *Lawrence v. Premier Indem. Assure. Co.* (1919) 180 Cal. 688, 697; a receipt *Haidinger-Hayes v. Marvin Hime & Co.* (1962) 206 Cal.App.2d 46, 52 and a book account *Epley v. Cunningham* (1955) 134 Cal.App.2d 614, 616.

of the contract *not inconsistent* with the written memorialization." *Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 638 (Emphasis added.) Moreover, a collective bargaining agreement – like any contract – is subject to the parol evidence rule. *Merk, supra,* 945 F.2d 892-93; *Lewis, supra,* 382 F.2d at 441-45; *Gatliff, supra,* 152 F.2d at 56; *Wilkes, supra,* 522 F. Supp. 106, 109.

Here, the Parol Evidence Rule defeats MCA's attempts to argue that the Unions are ostensibly parties to the 1994 Agreement. The 1994 Agreement is a partially integrated writing and the Unions' oral agreements were allegedly made *prior to* 1994 Agreement. Under the parol evidence rule, the Unions' oral agreements *cannot contradict the fact that only MCA and GBA are parties to the 1994 Agreement.* Accordingly, MCA cannot rely upon the prior oral agreements to in essence make the Unions parties to the 1994 Agreement. Because evidence of the Unions' oral waivers is inadmissible, MCA's claim must fail. Accordingly, judgment is warranted in GBA's favor.

2. The Subsequent Local 467 CBA Superseded The 1994 Agreement.

Assuming the 1994 Agreement and Local 467's oral agreement modified the respective CBA, that modification was superseded by a powerful integration clause in a subsequent CBA. The Local 467 written Agreement provides:

> This agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the

> parties shall be bound by or liable for, any statement, representation, promise, inducement or agreement not set forth herein.

The Associations and Local 467, in writing, modified and extended their respective CBAs effective July 1, 1994. The earlier 1994 Agreement (dated January 7, 1994) was not added, expressly or otherwise, to the Local 467 Agreement and, thus, it does not survive after the July 1, 1994 [p. 203] Agreement. Because MCA claims damages under the 1994 Agreement and the Local 467 Agreement for contractors moving from GBA to MCA *after* the 1994 Agreement had been subsumed, MCA's claims under the Local 467 Agreement fail.

MCA has never opposed this argument on the merits. Instead, at the summary judgment phase of this matter, it argued that the integration defense fails because it is arbitrable under the CBAs. It is MCA that brought this action, and as a result, it has waived any argument that the underlying claim or the integration defense is arbitrable. *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 318-19 ("Consistent with established law, we hold that, in the absence of a legal excuse, a party's failure to timely demand arbitration results in a contractual forfeiture of the right to compel arbitration."); *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888, 899.[7]

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[7] If GBA's integration defense is arbitrable, so too is MCA's contract claim because both arise out a contract that provides for grievance arbitration. Accordingly, if the Court finds this defense is arbitrable and that MCA has not waived its claim that GBA's integration defense is arbitrable, then GBA would move to amend its answer to allege that MCA's claims are barred by the arbitration agreement in the CBAs.

In short, MCA cannot defeat the integration defense and judgment is warranted in GBA's favor as to the Local 467 CBA.

3. The 1994 Modifications Also Violate The Notice Requirements Of Federal Labor Law.

The modifications purportedly wrought by the 1994 Agreement are also null and void under Section 8(d) of the NLRA. 29 U.S.C. § 158(d). Section 8(d) states that a party may only withdraw or modify a collective bargaining agreement if: (1) they provide written notice to the opposing side; and (2) notify state and federal mediation and conciliation services of the proposed contractual changes and any dispute relating thereto. The Supreme Court has declared that "the statutory notice requirement operates independently of whatever notice requirement the parties have fixed for themselves." *NLRB v. Lion Oil Company* (1957) 352 U.S. 282, 292-293. Accordingly, regardless of whether oral modification is permitted by an understanding between parties, failure to comply with Section 8(d) constitutes a violation of the NLRA.

[p. 204] Indeed, in *United Marine Division, Local 333* (1977) 228 N.L.R.B. 1107, a collective bargaining agreement between an employers' association and a union provided that the union could terminate the agreement as to any employer which was 30 days late on its insurance, pension and health and welfare contributions. The union, pursuant to that contract provision, terminated a member of the employers' association. Because the union gave no notice under Section 8(d), that termination was an invalid modification. *Id.* at 1107.

In its papers opposing summary judgment, MCA was unable to distinguish these controlling legal authorities and, as a result, chose to ignore them. Instead, it offered MCA's legal authority that is inapposite and easily distinguishable. (Opp., at 6-7.) MCA contends that the courts and the National Labor Relations Board do not require a section 8(d) notice for a mid-term modification of the contract. (MCA's Opp. to MSJ, at 8 n.2.) In support of this proposition, MCA cited *NLRB v. Graphic Communications Local 554 (World Color Press)* (7th Cir. 1993) 991 F.2d 1301. (*See* Opp., at 8 n.2.)

However, MCA misconstrues the focus of that decision. In *World Color Press,* the National Labor Relations Board concluded that section 8(d) notice need not be given when the parties sit down to *renegotiate a labor contract prior to its natural expiration. World Press,* 991 F.2d at 1306. That is not the case here because the parties *never* sat down to formal renegotiation talks concerning the underlying CBAs. Instead, MCA and GBA merely reached a side agreement whose indirect effect is to act as a mid-term modification of the contract. This indirect modification is not the type of renegotiation that was the subject of *World Color Press.* Accordingly, the modification allegedly wrought by the 1994 Agreement is void under California Civil Code §§ 1608, 1667.

C. MCA's Preemption Argument Is Without Merit.

Finally, Plaintiff opposes each of GBA's defenses to the Agreement, arguing they are preempted by Section 301 of the Labor Management Relations Act ("LMRA") and by the National Labor Relations Act ("NLRA"). (*See*

MCA's Opp., at 2-4, 6.) MCA is mistaken on several grounds.

[p. 205]**1. There Is Also No Preemption When The NLRA Is Used Defensively, As Here, Instead Of Offensively.**

Similarly, GBA's defense under section 8(d) is not preempted by the NLRA because GBA has employed the NLRA defensively, rather than offensively. It has been settled for nearly two decades that offensive use of the NLRA outside the auspices of the National Labor Relations Board is preempted, while defensive use of the NLRA is not. *Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 109 LRRM 2268. *Kaiser* amplifies this distinction as follows:

> . . . where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court *must* entertain the defense. While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e) [of the NLRA.]

Id.[8] Were the law as MCA represents, "parties could be compelled to comply with the contract clauses, the

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[8] As a corollary, while defenses aimed at a particular provision of a collective bargaining agreement (*e.g.*, provisions here dealing with CAFs) are not preempted, defenses attacking the legality of an entire collective bargaining agreement are preempted. *Glaziers and Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors* (9th Cir. 1982) 689 F.2d 1339, 1343-44 (the employers' challenge to the entire collective bargaining agreement because the union lacked majority status

lawfulness of which would be insulated from review by any court." *Id.*

Because GBA raises section 8(d) only in connection with its illegality defense directed at the 1994 Agreement and not the entire CBAs, the Court has jurisdiction and the obligation to consider it.

2. Preemption Does Not Apply Because The Court Can Resolve This Dispute By Reference To The Undisputed Facts And Without Interpreting The CBAs.

MCA first argues that the Court has no jurisdiction to hear the case under Section 301(a) of the LMRA. (29 U.S.C. § 185(a).) MCA is incorrect because section 301(a) confers federal jurisdiction over lawsuits for violation of the collective bargaining agreements. (29 U.S.C. § 185(a).) State courts have *concurrent* jurisdiction, but they must "apply federal law in exercising jurisdiction over litigation within the purview of Section 301(a.)" *Carpenters Health & Welfare Trust* [p. 206] *Fund v. Acme Industries, Inc.* (1990) 224 Cal.App.3d 187 (quoting *Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 102).

MCA's second argument is that GBA's defenses are preempted under Section 301(a). MCA is wrong again. In order to create the "inextricable" relationship which triggers Section 301(a) preemption, resolution of a claim or

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was preempted); *Milk Drivers and Dairy Employees Union, Teamsters Local 302 v. Vevoda, et al.* (9th Cir. 1985) 772 F.2d 530 (a claim that the entire collective bargaining agreement was illegal on the basis of fraudulent inducement was preempted.)

defense must require the interpretation of a collective bargaining agreement. Mere reference to or application of the collective bargaining agreement to resolve a claim or defense does not create the "inextricable" relationship. *Allis-Chalmers Corporation*, 471 U.S. at 220 (quoting *Lingle v. Norge Division of Magic Chef, Inc.* (1988) 486 U.S. 399, 412-15.)

California courts have reached the same conclusion. *Hillhaven Oakland Nursing, Ctr. v. Health Care Workers Union* (1996) 41 Cal.App.4th 846, 860. In *Hillhaven*, the Court of Appeal stated, "We recognize that the mere assertion of a reference to a collective bargaining agreement does not warrant preemption." *Id.* at 860. *See also, Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal.App.3d 1507, 1517 (simply reviewing the document to determine if the CBA has applicable provisions does not equal, in and of itself, an interpretation of the agreement.)

Here, resolution of GBA's defenses may occur *without* construing the CBAs. Instead, the Court may rely on the following undisputed facts to resolve the question of whether the CBAs could be modified by the 1994 Agreement:

1. GBA and MCA are parties to separate collective bargaining agreements with various unions, and their respective members who are signatory contractors are subject to those collective bargaining agreements.

2. The collective bargaining agreements at *issue required all changes to be in a writing* signed by a duly authorized representative of every party to the collective bargaining agreement. (Emphasis added.)

3. Assuming the January 7, 1994 letter is an agreement between GBA and MCA, it constitutes a midterm modification of the applicable collective bargaining agreements.

4. *The concerned Unions never agreed* to, or waived their right to agree to, this modification *in a writing* signed by a duly authorized Union representative. (Emphasis added.)

5. Master Labor Agreement with Local 467 contained the following integration clause: "This Agreement contains all covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make, and none of the parties shall be bound by or liable for, [p. 207] any statement, representation, promise, inducement or agreement not set forth herein."

6. No notice was given to any governmental agency concerning this modification to the applicable collective bargaining agreements.

(DUMF 1-8.) Because the Court need not construe the meaning of underlying CBAs to reach a determination of the issues in this case, there is no Section 301 preemption. *Lingle*, 486 U.S. at 412-15; *Hillhaven*, 41 Cal.App.4th at 860; *Wanland*, 230 Cal.App.3d at 1517.

3. Preemption Is A Double-Edged Sword And, If Plaintiff's Preemption Argument Is Accepted, Then MCA's Claims Are Also Subject To Preemption And Must Be Dismissed.

Even assuming, *arguendo*, that MCA's argument were correct, preemption only serves to undercut the validity of MCA's own claims which derive from the very same basis as GBA's defenses. In the words of MCA, Section 301 "preemption should be equally applicable *to a defense* which involves interpretation of a labor contract *as to a claim* which involves its interpretation." (Opp., at 4; emphasis in the original.)

Here, MCA's claims arise out of the same Agreement as GBA's claims. That Agreement, according to MCA's own Statement of Undisputed Material Facts, was a mid-term modification of the underlying CBAs. To determine whether that modification was effective and to grant MCA the declaratory relief which it seeks, then clearly those CBAs must be examined. As a result, resolution of MCA's claims is as dependent on the CBAs as Defendant's defenses ostensibly are and, if preemption is accepted, MCA's own claim must logically be preempted, too. *See Allis-Chalmers, supra,* 471 U.S. at 221 (holding "when resolution of a state-law claim is substantially dependent upon analysis of the terms of . . . [cba], that claim must either be treated as Section 301 claim . . . or dismissed as pre-empted by federal labor-contract law.").

In short, assuming one accepted MCA's preemptive-sword argument, that sword would equally pierce MCA's claim of *a valid and enforceable Agreement*, because MCA's

contract claim and GBA's defenses derive from the same 1994 Agreement and CBAs. MCA's selective argument, if accepted, would mean GBA's defenses to MCA's contract claims are preempted, while the underlying contract claim itself is not. Thus, MCA's position is fatally flawed. (*See* MCA's Opp. to MSJ, at 5, [p. 208] fn 1.) Accordingly, whether the Court accepts GBA's defenses or MCA's preemption argument, every road leads to judgment for GBA and against MCA.

D. Because Agreements Of Indefinite Duration Are Terminable At Will, Defendant GBA Had The Legal Right To Terminate The 1994 Agreement.

In May 1996, GBA terminated the 1994 Agreement. This action was proper because an agreement without a fixed date of termination is a contract of indefinite duration that is terminable at will. *Cf* Cal. Comm. Code § 2309 (contracts of indefinite duration are valid for a reasonable time, but unless agreed may be terminated at any time by any party.) *See also Consolidated Theaters, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal. 2d 713, 727; *Reely v. Chapman,* 177 Cal. App. 2d at 262. Here, the 1994 Agreement has no termination date and no fixed term of duration.

When no termination date is specified in the contract, the courts look to the circumstances under which the contract was created in order to determine if the parties intended the contract to last for a specific period of time. The only way to determine a contract's duration is to look at the circumstances under which it was conceived. Here,

there are no facts to indicate that the parties intended for the 1994 Agreement to have a fixed term. Because the 1994 Agreement has no fixed term of duration, it was an indefinite contract that was terminable at the will of either party.

The only conceivable way for Plaintiff MCA to overcome this conclusion is to imply a fixed duration for the 1994 Agreement by reference to the terms of duration for the two CBAs then in existence. This approach, however, cannot salvage Plaintiff's claims. One CBA states that it will continue unless properly terminated, while the other was set to expire in July 1995 before being extended to 1998. The first CBA cannot help Plaintiff because it requires a written notice of termination and the second CBA was meant to expire long before this instant dispute arose.

MCA does not dispute Defendant's argument regarding termination of indefinite agreements. *Cf* Cal. Comm. Code § 2309 (contracts of indefinite duration are valid for a reasonable time, but unless agreed may be terminated at any time by any party.) *See also Consolidated Theaters, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal. 2d 713, 727; *Reely v. Chapman*, 177 Cal.App.2d at 262.

[p. 209] Instead, MCA's Opposition to summary judgment merely offers the unsupported generalization that indefinite contracts are enforceable for a reasonable period of time. (Opp., at 8.) This observation is inadequate to overcome the plain fact that the 1994 Agreement has no termination date and no fixed term of duration.

It also cannot overcome the fact that its President, Scott Strawbridge, admitted in his deposition that the

term of the contract was indefinite. UMF 18. This admission conclusively demonstrates that none of the parties believed the Agreement to last for a specific term and, as such, mandates a finding that the contract was terminable at the will of either party. Pursuant to this right, Defendant GBA terminated the agreement.

MCA's sole remaining argument is the incorrect assertion that a court adjudication of this issue would be a advisory opinion. (*See* Opp., at 8.) MCA's position is embarrassingly contradictory. On MCA's summary judgment motion, MCA phrases its issue as "was the Letter Agreement a valid, enforceable agreement". And, MCA pleads in the Complaint "the MCA-GBA agreement is a legally binding and enforceable contract." (Compl., at ¶ 26) Subsumed within this issue is whether GBA terminated the Agreement. Moreover, the Court is not being asked to decide this issue in a vacuum, but based on the undisputed, concrete facts of this case.

To make matters worse, MCA's "advisory opinion" argument is legally deficient. As a matter of law, an opinion is only advisory if a litigant has no personal interest in the outcome of the adjudication. *Stocks v. City of Irvine* (1981) 114 Cal. App. 3d 520, 528. That is not the case here because GBA has a significant interest in testing whether the 1994 Agreement has been terminated. Accordingly, a decision by the Court regarding the validity of the agreement and whether it has been terminated would not be "advisory" in nature.

[p. 210] **III. CONCLUSION**

For all the foregoing reasons, GBA respectfully requests that the Court enter judgment in GBA's favor.

Dated: March 14, 1997

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation

By: /s/ Daniel Croley
DANIEL A. CROLEY

Attorneys for Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

[p. 211] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
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Telephone: (415) 989-4800
Facsimile: (415) 989-4864

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 **TRIAL STIPULATIONS** (Filed MAR. 18, 1997) Trial Date: March 18, 1997 Time: 9 a.m. Dept.: 10

1. The parties stipulate that the Court may try this case on the basis of the papers in the Court's file, including all documents filed in connection with Motions for

Summary Adjudication, and Declarations filed therein may be treated as trial testimony, subject to all appropriate objections.

~~2. The Court may also consider the deposition testimony of Scott Strawbridge, subject to all appropriate objections~~ DC/JC.

3. The parties agree that there is no dispute as to the amount of damages involved in the case. The records and reports of the Administrator of funds paid under the Collective Bargaining [p. 212] Agreements shall be deemed conclusive as to the amounts owing to MCA if the Court finds that GBA has breached an enforceable contract, and MCA may be awarded interest based on said Administrator's reports.

4. Both parties waive the presentation of live testimony, and stipulate that the Court may deem the matter submitted on the basis of this stipulation, the Motion in Limine and Response thereto, and such argument as the Court deems appropriate. However, if the Court wishes testimony on any subject, or additional argument, it may schedule a trial or hearing, limited to those subjects determined by the Court to be necessary to a decision based upon a complete record.

This stipulation is entered into this 18th day of March, 1997.

/s/ James A. Carter
James A. Carter
Attorney for Plaintiff MCA

/s/ Daniel A. Croley
Daniel A. Croley
Attorney for Defendant GBA

[P. 213] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: JUDITH WHITMER KOZLOSKI JUDGE
DATE: March 18, 1997
FILE NO.: 394184

DEPT. NO: 10 Linda Fitzgibbon CLERK
~~Pamela Fisk~~ S. Van Aken REPORTER

(TITLE OF ACTION)	(APPEARANCES)
MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA	J. CARTER FOR PLAINTIFF
Plaintiff	
vs.	
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS	DANIEL A CROLEY FOR DEFENDANT SALIMÉ SAMII FOR DEFT.
Defendant	
NATURE OF PROCEEDINGS	COURT TRIAL

9:15 A.M. COURT CONVENED. COUNSEL AS LISTED ABOVE PRESENT. THE MATTER WAS ORALLY ARGUED BY COUNSEL AND SUBMITTED. MATTER TAKEN UNDER SUBMISSION.

3:00 P.M. HEARING IN THE ABOVE ENTITLED MATTER HAVING BEEN HELD AND THE MATTER SUBMITTED TO THE COURT FOR CONSIDERATION AND DECISION, AND THE COURT NOW BEING FULLY

ADVISED IN THE PREMISES HEREIN RENDERS ITS DECISION AS FULLY SET FORTH BELOW:

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE ALL OF MCA'S EVIDENCE FROM TRIAL IS GRANTED."

[p. 214] **AFFIDAVIT OF MAILING** CASE NO. 394184

(Filed MAR. 18, 1997)

MECHANICAL CONTRACTORS ASSOCIATION vs GREATER BAY AREA ASSOCIATION

Document: MINUTE ORDER DECISION-SUBMITTED 3/18/97

I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at Redwood City a true copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to the following:

DANIEL A CROLEY
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
650 CALIFORNIA STREET, 20th FLOOR
SAN FRANCISCO, CA 94108-2693

JAMES CARTER
CARTER & CARTER
425 CALIFORNIA STREET, 19th FLOOR
SAN FRANCISCO, CA 94104

Executed on MARCH 18, 1997
at Redwood City, California

CLERK OF THE SUPERIOR COURT

By /s/ Illegible
Deputy Clerk

[p. 215] **GEORGE J. TICHY II, CSB 941146**
DANIEL A. CROLEY, CSB 154386
LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California Corporation, Plaintiff, v. **GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,** a California corporation, Defendant.	**Case No. 394184** **DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.'S NOTICE OF ENTRY OF JUDGMENT** (Filed MAR. 20, 1997)

TO: PLAINTIFF MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 18, 1997, Judgment in the above-referenced matter was entered in favor of Defendant Plumbing-Heating-Cooling Contractors Association of Greater Bay Area, Inc. (sued herein in as Greater Bay Area Association of Plumbing and Mechanical Contractors) and against Mechanical Contractors [p. 216] Association of Northern California. Attached and fully incorporated herein by reference is a true and correct copy of the Court's March 18, 1997 Order.

Dated: March 19, 1997

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation

By: /s/ Daniel A. Croley
DANIEL A CROLEY

Attorneys For Defendant
PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.

[p. 217] **EXHIBIT A**

[p. 218] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN MATEO

HONORABLE: JUDITH WHITMER KOZLOSKI JUDGE
DATE: March 18, 1997
FILE NO.: 394184

DEPT. NO: 10 Linda Fitzgibbon CLERK
Pamela Fisk REPORTER

(TITLE OF ACTION) (APPEARANCES)

MECHANICAL CONTRACTORS ASSOCIATION OF NOTHERN CALIFORNIA — J. CARTER FOR PLAINTIFF

Plaintiff

vs.

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS — DANIEL A CROLEY FOR DEFENDANT SALIMÉ SAMII FOR DEFT.

Defendant

NATURE OF PROCEEDINGS COURT TRIAL

9:15 A.M. COURT CONVENED. COUNSEL AS LISTED ABOVE PRESENT. THE MATTER WAS ORALLY ARGUED BY COUNSEL AND SUBMITTED. MATTER TAKEN UNDER SUBMISSION.

3:00 P.M. HEARING IN THE ABOVE ENTITLED MATTER HAVING BEEN HELD AND THE MATTER SUBMITTED TO THE COURT FOR CONSIDERATION AND DECISION, AND THE COURT NOW BEING FULLY

ADVISED IN THE PREMISES HEREIN RENDERS ITS DECISION AS FULLY SET FORTH BELOW:

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE ALL OF MCA'S EVIDENCE FROM TRIAL IS GRANTED."

[p. 219] **AFFIDAVIT OF MAILING**

CASE NO. 394184
(Filed March 18, 1997)

MECHANICAL CONTRACTORS ASSOCIATION vs GREATER BAY AREA ASSOCIATION

Document: MINUTE ORDER DECISION-SUBMITTED 3/18/97

I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at Redwood City a true copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to the following:

DANIEL A CROLEY
LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
650 CALIFORNIA STREET, 20th FLOOR
SAN FRANCISCO, CA 94108-2693

JAMES CARTER
CARTER & CARTER
425 CALIFORNIA STREET, 19th FLOOR
SAN FRANCISCO, CA 94104

Executed on MARCH 18, 1997
at Redwood City, California

CLERK OF THE SUPERIOR COURT

By **LINDA FITZGIBBON**
Deputy Clerk

[p. 220] **PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler, Mendelson, Fastiff, Tichy & Mathiason, 650 California Street, 20th Floor, San Francisco, California 94108-2693. On March 19, 1997, I served the within document(s): **DEFENDANT PLUMBING-HEATING-COOLING CONTRACTORS ASSOCIATION OF GREATER BAY AREA, INC.'S NOTICE OF ENTRY OF JUDGMENT**

_ by facsimile transmission at or about _____ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (415) 399-8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.

X **by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.**

_ by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in a Federal Express pick up box or office designated for overnight delivery, and addressed as set forth below.

_ by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

James A. Carter, Esq.
Brian M. Carter, Esq.
CARTER & CARTER
425 California Street
19th Floor
San Francisco, CA 94104

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing and for shipping via Federal Express. Under that practice it would be deposited with the U.S. Postal Service or if a Federal Express shipment, deposited in a Federal Express pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 19, 1997 at San Francisco, California.

/s/ Gloria M. Dunlap
GLORIA M. DUNLAP

[p. 221] JAMES A. CARTER (CBN 33119)
BRIAN M. CARTER (CBN 132710)
CARTER & CARTER
425 California Street, 19th Floor
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Telephone: (415) 989-4800
Facsimile: (415) 989-4864

Attorneys for Plaintiff
MECHANICAL CONTRACTORS ASSOCIATION
OF NORTHERN CALIFORNIA

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation, Plaintiff, v. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation, Defendant.	Case No. 394184 **NOTICE OF APPEAL; NOTICE DESIGNATING CLERK'S TRANSCRIPT; NOTICE TO PREPARE REPORTER'S TRANSCRIPT** (Filed MAY 6, 1997)

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that Plaintiff MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA (hereafter "MCA") appeals to the Court of Appeal for the First Appellate District from the Court's Order granting Defendant GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS (hereafter "GBA") Motion in Limine, and the Court's Judgment, both entered on March 18, 1997 in favor of Defendant GBA and against Plaintiff MCA, and from the whole thereof.

NOTICE IS FURTHER GIVEN that Plaintiff MCA designates the following papers and records on file or lodged with the Clerk of the above-entitled Court for incorporation in the record on appeal, and hereby requests the preparation of a Clerk's Transcript which shall include:

[p. 222] 1. Plaintiff's Complaint, filed October 24, 1995.

2. Defendant's Answer to Complaint, filed on or about November 27, 1995.

3. Stipulation and Order, filed April 19, 1996.

4. Defendant's First Amended Answer to Complaint, filed April 19, 1996.

5. Index to Declarations and Exhibits in Support of Motion for Summary Adjudication, including all attached Exhibits, filed October 28, 1996.

6. Stipulation and Order to File Second Amended Answer, including all attached Exhibits, filed February 10, 1997.

7. Trial Stipulations, filed on or about March 18, 1997.

8. Defendant's Trial Brief, filed on or about March 14, 1997.

9. Defendant's Notice of Motion in Limine, filed on or about March 13, 1997.

10. Defendant's Memorandum of Points & Authorities in Support of Motion in Limine, filed on or about March 13, 1997.

11. Declaration of Daniel A. Croley in support of Motion in Limine, including all attached Exhibits, filed on or about March 13, 1997.

12. Plaintiff's Response to Defendant's Memorandum of Points & Authorities in Support of Motion in Limine, filed on or about March 16, 1997.

13. The Court's Minute Order granting Defendant's Motion in Limine, entered March 18, 1997.

14. Defendant's Notice of Entry of Judgment, including all attached Exhibits, filed on or about March 19, 1997.

15. All Clerk's Minutes.

NOTICE IS FURTHER GIVEN that Plaintiff MCA hereby requests that a Reporter's Transcript be prepared of all oral proceedings in this action, including:

1. All oral proceedings of the trial, held on March 18, 1997 in Department 10, including all rulings, acts, arguments or statements of the Court and counsel at trial.

Dated: May 5, 1997

CARTER & CARTER

By: /s/ James A. Carter
James A. Carter
Attorney for Plaintiff/
Appellant MCA

[p. 223] **PROOF OF SERVICE**

BY U.S. MAIL

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years, and not a party to the within entitled cause; my business address is:

425 California Street, 19th Floor, San Francisco, California 94104.

I am readily familiar with my employer's practices for collection and processing of correspondence for mailing with the United States Postal Service.

On May 6, 1997, I served the attached:

1. **NOTICE OF APPEAL; NOTICE DESIGNATING CLERK'S TRANSCRIPT; NOTICE TO PREPARE REPORTER'S TRANSCRIPT**

on the interested parties in the within action by placing a true copy (copies) of same enclosed in a sealed envelope

with postage fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Daniel Croley, Esq.
Littler, Mendelsohn et al
650 California Street, 20th Floor
San Francisco, CA 94108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 6, 1997.

/s/ Michelle Q. Carter
Michelle Q. Carter

[p. 224] IN THE SUPERIOR AND MUNICIPAL COURTS OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTOTS ASSOCIATION OF NORTHERN CALIFORNIA, a California corporation,

Plaintiff/Appellant

vs.

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS, a California corporation,

Defendant/Respondent

NO: 394184

NOTICE OF FILING OF APPEAL

(Filed MAY 14, 1997)

Notice is hereby given that a NOTICE OF APPEAL was filed in the above action on May 6, 1997 from the Order granting defendant's Motion in Limine and the Court's Judgment entered on March 18, 1997.

DATED: May 14, 1997

PEGGY THOMPSON, Clerk of the Superior and Municipal Courts

By Ouida Lewis
Deputy Clerk

AFFIDAVIT OF MAILING

I declare under penalty of perjury that on the above stated date I deposited in the United States Post Office mail box at Redwood City, California, a true copy of the above notice, enclosed in an envelope, with the proper and necessary postage prepaid, and addressed to COURT OF APPEAL, STATE OF CALIFORNIA, MARATHON PLAZA – SO. TOWER, 303 SECOND STREET, SUITE 600, SAN FRANCISCO, CA 94107

Daniel Croley, Esq., 650 California St., 20th Floor, San Francisco, CA 94108.

Executed on the date stated above at Redwood City, California.

PEGGY THOMPSON, Clerk of the
Superior and Municipal Court

By Ouida Lewis
Deputy Clerk

[p. 225] **IN THE SUPERIOR AND MUNICIPAL COURTS OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO**

MECHANICAL CONTRACTORS ASSOCIATION ETC.

Plaintiff/Appellant

vs

GREATER BAY AREA ASSOCIATION, ETC.

Defendant/Respondent

NO: 394184

NOTICE FROM CLERK OF ESTIMATED COST OF PREPARING TRANSCRIPTS

(Filed MAY 14, 1997)

TO: James A. Carter, Esq., CARTER & CARTER, 425 California St., 19th Floor, San Francisco, CA 94104-2204.

YOU WILL PLEASE TAKE NOTICE THAT THE ESTIMATED COST OF

1. Preparing the Reporter's Transcript is $ Deposit paid
2. Preparing the Clerk's Transcript is $601.75

LESS DEPOSIT **-100.00**

The total amount which must be deposited with the Clerk of this Court within ten (10) days from the mailing of this notice is $501.75.

DATED: May 14, 1997

PEGGY THOMPSON, Clerk of the Superior and Municipal Courts

By Ouida Lewis
Deputy Clerk

AFFIDAVIT OF MAILING

I declare, under penalty of perjury, that on the above stated date I deposited in the United States Post Office mail box at Redwood City, California, a true copy of the above Notice, enclosed in an envelope, with the proper and necessary postage prepaid thereon and addressed as stated above.

Executed on the date stated above at Redwood City, California.

PEGGY THOMPSON, Clerk of the Superior and Municipal Court

By Ouida Lewis
Deputy Clerk

[p. 226] **IN THE SUPERIOR AND MUNICIPAL COURTS OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO**

MECHANICAL CONTRACTORS ASSOCIATION ETC.

Plaintiff/Appellant

vs.

GREATER BAY AREA ASSOCIATION, ETC.

Defendant/Respondent

NO: 394184

NOTICE TO PREPARE TRANSCRIPTS ON APPEAL (Rule 4)
(Filed MAY 14, 1997)

TO: Stacy Van Aken

You are hereby noticed to prepare the reporter's transcripts in accordance with the notices of the parties and file an original and one copy of the same with the clerk.

HEARING DATES:

Stacy Van Aken – March 18, 1997.

APPEAL FROM: Order granting Motion in Limine and Judgment entered March 18, 1997.

( ) The estimated cost to prepare the clerk's and reporter's transcripts on appeal was deposited with the Superior Court.

AMOUNT: $325.00 RECEIPT NO: 01-09671

DATE OF DEPOSIT: May 6, 1997

BY: Carter & Carter

( ) Pursuant to Rule 4(c) on ___, the court reporter filed a written waiver of such deposit with the clerk.

NOTICE MAILED: May 14, 1997

Peggy Thompson, Clerk of the
Superior and Municipal Courts

By Ouida Lewis
Deputy Clerk

STATE OF CALIFORNIA)
) SS.
COUNTY OF SAN MATEO)

I, **PEGGY THOMPSON,** Clerk of the Superior and Municipal Courts for the County of San Mateo, State of California, do hereby certify that I have compared the papers and documents constituting the foregoing Clerk's Transcript with the original papers and documents in the files in my office in the certain action brought pending in said Superior Court, numbered 394184 in said files, and that the same are full, true and correct copies of the originals on file in my office in said action including appellant's Notice of Appeal.

WITNESS my hand and seal of said Superior and Municipal Courts this day 28th of JULY , 1997.

[SEAL]

PEGGY THOMPSON, CLERK OF THE SUPERIOR AND MUNICIPAL COURTS

BY /s/ Ouida Lewis
Deputy Clerk

APPENDIX F

COURT OF APPEAL, FIRST APPELLATE DISTRICT
STATE OF CALIFORNIA

MECHANICAL CONTRACTORS ASSOCIATION, ETC., Plaintiff/Appellant, vs. GREATER BAY AREA ASSOCIATION, ETC., Defendant/Respondent.	)	CASE NO. 394184

REPORTER'S TRANSCRIPT ON APPEAL

Appeal from the Order granting Motion in Limine and Judgment entered March 18, 1997.

APPEARANCES:

FOR THE PLAINTIFF
AND APPELLANT:

FOR THE DEFENDANT
AND RESPONDENT:

IN THE SUPERIOR AND MUNICIPAL COURTS
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA,	)	
Plaintiff,	)	
vs.	)	CASE NO. 394184
GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS	)	
Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
JUDITH W. KOZLOSKI, JUDGE
DEPARTMENT 10

MARCH 18, 1997

APPEARANCES:

FOR THE PLAINTIFF:	JAMES A. CARTER, Esquire Carter & Carter 425 California Street, 19th Floor San Francisco, CA 94104
FOR THE DEFENDANT:	DANIEL A. CROLEY, Esquire SALIME SAMIL, Esquire Littler, Mendelson, Fastiff, Tichy & Mathia 650 California Street, 20th Floor San Francisco, CA 94108
REPORTER:	STACY A. VAN AKEN Pro Tem Court Reporter C.S.R. No. 10969

[p. 3] PROCEEDINGS

March 18, 1997 Redwood City, CA

THE CLERK: Calling the matter of Mechanical Contractors Association versus Greater Bay Area Association.

MR. CARTER: For the plaintiff, Mechanical Contractors Association, James A. Carter.

MR. CROLEY: For the defendant, Daniel Croley and Salime Samil.

THE COURT: This has been assigned to this Court for trial. Is that your understanding?

However, what you have agreed, as I understand it, is that the issue will be presented to the Court on the Motion in Limine through arguments only and the papers that have been filed, and that will be dispositive of the case?

MR. CROLEY: We have also referenced other files of the Court including our cross-motions for summary adjudication and including our separate statements and the facts contained therein.

THE COURT: Yes. I think I have all of the papers I need. I didn't have the trial briefs; but if the issue is strictly this one question, then I don't know that I need the trial brief.

[p. 4] MR. CARTER: I didn't file the trial brief because I felt my response to the Motion in Limine set forth everything. In fact, I characterized that in the trial brief earlier.

I would like to make one motion for the record. The Court may or may not need to reach the issue. But you will see that I made the point that, if the document in question had been called an assignment, then many of the arguments – the defense would not have been applicable. Thus, I would like to make an oral motion to reform the contract in question to an assignment.

The Court may or may not need to reach that issue. If you do reach it, you may want supplemental briefing. I informed Mr. Croley that I was making that oral motion in order that that be in the record if the Court deems it appropriate. He stated he would object. I said, "I'm not surprised," and you may very well want supplemental briefing on that.

MR. CROLEY: I was advised of that motion or your intent to make such a motion this morning, and the first time that the assignment theory came into this case was yesterday in connection with MTA opposition to our Motion in Limine.

Prior to that time, that defense or claim [p. 5] had never been raised in connection with this matter, and we would obviously oppose any attempts for an equitable remedy of reformations.

THE COURT: I would like to go back to discuss what we are going to do here today, and then I'll talk about this oral motion.

Is it your understanding that the Court is going to rule, and then we will proceed or we won't proceed?

I need to take this under submission and continue reading the points and authorities that were given to me.

It was given to me yesterday in the afternoon, and I have had other things to do. So I'm not prepared to rule. That's your understanding, right?

MR. CROLEY: I guess my discussion would be that you have an opportunity to review the papers, and if you believe – well, I guess we would like the opportunity to present oral arguments after you have had an opportunity to review the papers.

Our trial brief raises two issues not addressed in our Motion in Limine. One that the unions didn't make a valid waiver, and the second argument that we had terminated the 1994 letter. Those are the only two arguments that are in our [p. 6] trial brief which are not set forth in our Motion in Limine.

MR. CARTER: Let me give you my understanding of the status before the Court under the stipulation, and that after reading the record and reviewing the points and authorities, that you are authorized as a trial Court to decide this case without presentation of any live testimony.

If the Court in reviewing those records feels that, one, you want live testimony on any subject, you certainly can –

THE COURT: No. I don't want any live testimony.

MR. CARTER: I don't think you will need that, but we are giving you that authority if you want it. Not today. We are saying, if you read the record a week from now and say, "One issue troubles me. I would like your

testimony on subject 'X,' " you have that authority under stipulation.

Secondly, if you want supplemental arguments on any subject before issuing your statement of decision, you can set a hearing and say, "I would like arguments on subject 'X' 'Y' or 'Z.' "

So you have complete authority, you are the trial Court. It has been submitted to you under [p. 7] the stipulation, but you have the authority as we have indicated.

THE COURT: What I would like is argument today, and if I need argument – I have read enough of the points and authorities to understand what the issues are.

I just haven't had a chance to read all the cases to see what they say specifically. I would like argument today because I think it would help me when I'm reading the points and authorities to have heard the argument.

If I need additional argument, I'll schedule it for that. But otherwise, I'll just issue a tentative decision and then whoever the non-prevailing party is can bring objections to that, and we will just proceed in that fashion.

Then, I guess, if there is something left to try, we can proceed and then try it once that has taken place. That's your understanding?

MR. CARTER: Hopefully, there will be nothing to try after you have heard the arguments and read the papers and see whether there is anything to "try."

THE COURT: Is there no issue of damages?

MR. CARTER: No.

[p. 8] MR. CROLEY: We have stipulated that records will recover the damage issue. There is no dispute as to the amount. It's just a question of whether or not there is a contract.

THE COURT: Okay.

MR. CARTER: To address that, I believe what your statement of decision can say is the parties are directed, consistent with this, to meet and stipulate to damages. If they can't, you resolve it.

But these reports are all filed by contractor through administrator. They show the reports, show how much money was paid. Once we get your decision, we can stipulate to damages.

THE COURT: All right. Since you are plaintiff, would you like to address the Court?

MR. CARTER: I would be pleased to, Your Honor.

THE COURT: All right. I need you to do something for me. I have not been associated with Collective Bargaining Agreements before. Does it specify which organizations are members of which bargaining unit?

MR. CARTER: Let me address that, Your Honor. I'll answer that question.

[p. 9] THE COURT: I'm having trouble understanding why this dispute is covered by the Collective Bargaining Agreement. It seems to me that the Collective Bargaining Agreement would be between the MCA and

GBA and the unions and why who is a member of what, which one affects that.

MR. CARTER: Let me answer that first since that's your primary question. The union – in this case two unions, but I'll call them the union – has what they call a Master Labor Agreement which is the Collective Bargain Agreement.

They may have some unions – have up to five of those with different employer associations within the plumbing and pipe fitting industry, and often those contractors will be an association that enters into a Collective Bargaining Agreement with the local union, and the local union will have the basic wages. For example, the fringe benefits will be the same.

In some of them, you will have working conditions that differ. If you are in the service industry, you have different overtime. If you are in plumbing, you are going to pay double time on Sunday. But if you are doing a service call in the same plumber union, you may not have to pay double [p. 10] time on Sunday.

In this case, these two associations represent plumbing contractors who are in the basic same kind of industry, thus the Collective Bargaining Agreement. All the substance of the provisions are the same.

The only thing that differs is the name of the association, and the grievance proceedure lets that association arbitrator and dispute resolution person set up boards and receives money under the Collective Bargaining Agreement like a fringe benefit for performing that additive service.

So you have two Collective Bargaining Agreements. One, let's just say, with MCA. MCA will come into the union and say here are the contractors that we represent. They give them a list of maybe 20 contractors. Those are the parties bound to the MCA agreement. So the Collective Bargaining Agreement won't say who is bound. That's in a separate letter handed to the union.

GBA, when it goes in, will hand the union a letter saying these are the contractors represented by GBA, and those contractors, thus GBA if a dispute arises, they would go to GBA and say, "GBA, we have a dispute with the union's overtime pay. Would you [p. 11] take it up with the union?"

If a dispute arrises, GBA would then go to grievance, select an arbitrator, represent the contractors say in arbitration, and so on.

So what happened in this particular case is: Contractors signatory to the GBA agreement several years ago – they are Mal (phonetic) and Naddle (phonetic) were the names of them – said, "We would like to switch from the GBA agreement to the MCA agreement. We want MCA to represent us in grievance" and that sort of thing, and GBA would cease to receive our contract administration funds. They would go to MCA. So a dispute arose as to whether those contractors could transfer.

The union basically said in both cases, "We leave that up to the contractors. We, the union, do not want to be involved in which contractors are represented by which association and whether they want to switch from one to the other. If the employer can agree on that, that's fine with us."

A lot of letters were written and attorneys' fees were being incurred, and the officers of both MCA and GBA decided we ought to try to resolve this matter.

They talked to the unions about it. The [p. 12] unions said to officers of both, "Why don't you guys resolve them" because the unions were getting caught in the middle with both associations calling the union saying, "Would you tell the administrator to send the moneys to us." And the unions were saying, "Wait a minute. We don't want to get caught in this. You guys go straighten it out."

So a meeting was held in December of 1993 between officers of MCA and GBA to try to resolve the dispute concerning the two contractors and future disputes when contractors wanted to switch from one to the other.

At that meeting, Scott Strawbridge, the executive of MCA says, "I got an idea that I think might resolve this. Let me send you a letter." And so Strawbridge drafted it and sent the letter of January 7th, 1994.

I think we called it the "letter agreement," and they call it the "private agreement," I think. But there is a letter agreement and that letter agreement basically said: This is a procedure to resolve the current dispute regarding titlement in the funds from the two contractors – they are Mal (phonetic) and Naddle (phonetic) – and under that resolution that's contemplated by MCA, they were [p. 13] getting those funds.

The administrator has said, since the contractors in both cases have said they want the money to go, the moneys were coming to MCA but the unions then were

being called by GBA saying, "You should have let that money go to MCA."

That's why the unions were getting caught in the middle of it, and they were saying, "We don't want to get caught in the middle."

So the letter agreement was sent and it had accompanied a $5,000 check, and it said,

> "If this agreement is satisfactory and your board ratifies it, please initial and return it. You can then deposit the $5,000 check. This will resolve the past dispute and will also set up a resolution procedure for future contractor switches."

So if a contractor in the future wants to transfer, all they have to do is put it in writing and then the transfer can take effect on the anniversary date of the agreement. That makes it e ier for administrative purposes, so you can't do it any time of the year.

But the funds transfer would only take [p. 14] place on – I think June 30th was the anniversary date agreement – and a few months after that agreement was placed into effect, a company called Egan Plumbing, I believe it was, was being represented by MCA.

And Egan said, I would like to transfer and have my funds go to GBA. And MCA, since we have the letter agreement that authorizes transfers I hear about, approved the transfer, and those moneys started going to GBA.

So now, at this point, GBA has received consideration of $5,000. They received the transfer of the contractors, and they are receiving the contract administration funds.

Then sometime in 1995, the month isn't material, two GBA contractors gave notice that they wanted the transfer to MCA and one of them ironically was the person who had been the president of GBA at the time this agreement was signed. His name is Peterson. So he said, "I want this transfer from GBA to MCA," and another contractor called Design Mechanical, same thing, writes a letter.

He writes a letter saying, we want to transfer, and the GBA board then decided that they would not comply with the earlier letter of [p. 15] agreement.

So they informed the administrator that there was no agreement permitting transfer of funds, that the funds should continue coming to them, and that's what lead to the lawsuit.

THE COURT: I'm sorry. I have to take a phone call. Just give me a few minutes.

(Recess taken.)

THE COURT: The record should reflect that the attorneys are present.

So I understand the factual scenario which I had read, but it's always good to hear it again. The way in which the contractor that wished to transfer between the associations is a party to this Collective Bargaining Agreement is as a member of the association?

MR. CARTER: Yes. They are not necessarily the same. You can be a member of an association and not signator to the Collective Bargaining Agreement.

THE COURT: So what you do is file a list or schedule of people who are subscribing to this collective bargaining agreement, and that's incorporated in the Collective Bargaining Agreement as an agreement between those parties and the union?

MR. CARTER: It's correlated. In a sense, [p. 16] it's part of the negotiating history. It's commonly done. As I said, the association hands the union a letter saying these are the people that we represent, and that will be bound. So the agreement saying GBA – it may say "for the following," but commonly they don't.

They will simply – the parties may have an appendix. Sometimes it's just the negotiating history. There are a variety of ways how you identify who the contractors are. You can be signator without being a, quote, member of that association.

Similarly, many associations have both union and common union members, and so the fact that you are a member of the union doesn't make you automatically a signatory to the Collective Bargaining Agreement. That's a matter of communication between the association and the union as to which contractors are signatory.

In this case, there was no dispute that the two contractors in question were signatory to the GBA agreement. Thus, they can only transfer to the MCA agreement with union consent.

There is no question that you have to have union consent. If the union said "no," those [p. 17] contractors who are signatory to GBA must remain signatory to GBA; we wouldn't be here. Union consent is essential.

When the unions say, "We waive. We agree that if the contractors want to switch from one association to the other, that's okay with us," the union then gave us the authority to make the transfers.

I understand they contend that that union concurrence had to be, in writing, contemporaneous, etc. We contend that's not true. But in case there is no dispute; two contractors were signatory the GBA agreement.

They indicated in writing they wanted to switch to MCA. The union had no objection to that, and only much later did GBA raise objections.

When it accepted the contractor from MCA, it didn't raise any objection. It's only when two of its members wanted to exercise its rate when it came up with the defenses that are being asserted.

It's definitely an incorrect factual deduction. But first I would like to address your primary issue of whether or not the modifications to the – whether or not the 1/7/94 letter brought a modification to the Collective Bargaining Agreement.

[p. 18] The Collective Bargaining Agreement has a long history. They date back in some cases to the 1960's – very detailed written agreements, 30 to 40 pages in length.

They cover the very issues which are at issue in this case. For example, the association's only rights to contract administration funds for the contractors are derived from the Collective Bargaining Agreement, and the Collective Bargaining Agreements themselves govern the

manner in which they may be modified. There is no question about that.

It's also clear that the 1/7/94 letter modified the Collective Bargaining Agreement in two ways. First, two contractors of GBA attempt to terminate the GBA Master Labor Agreement and enter into the MCA Master Labor Agreement.

So, again, there is a termination of one set of agreements as to the two contractors who attempted to switch and enter into the MCA Master Labor Agreement.

The second impact in modification of the Collective Bargaining Agreement is the transference of bargaining obligations. One, there was a transfer. MCA had the obligation of servicing those two contractors, and GBA no longer had a [p. 19] further obligation to them.

So the Collective Bargaining Agreement is really paramount here. We are just dealing with a one-page very small letter between two associations that, by themselves, have no authority to modify the governing documents whichever the Collective Bargaining Agreement.

Now I would like to go back to the factual depiction that was given before.

THE COURT: But, in fact, they did agree to modify this and apparently to the benefit of GBA, who then accepted a transfer.

MR. CROLEY: Well, the only transfer that he has referenced is Egan Plumbing Company, and Egan Plumbing Company was actually a GBA board member that was erroneously paying its dues to MCA.

That's the only transfer that we accepted. So the dues should have been coming to us because the Egan Plumbing Company was actually on our board and the president, Scott Strawbridge, knew it the whole time and that it was funny that he was receiving dues for one of GBA's contractors. This mystical $5,000 check and that we received and absconded off with is a fallacy.

What happened is we took their $5,000 [p. 20] check, and they received the rights to $5,000 to somebody else, and they actually received the payment in a month or two. So it's not like we have attempted to abuse the situation.

We have not received any benefit for it, and our position in this case is not to repudiate the 1/7/94 letter but rather to enforce the terms of the Collective Bargaining Agreement to state that both associations have to honor that agreement. That is the governing document.

It is the real source of relationships between the associations and with the unions. The 1/7/94 letter is simply just one part of that governing Collective Bargaining Agreement.

THE COURT: It does, though, appear from the way that the facts are set forth, that MCA and GBA arrived at an agreement, that GBA then later decided that it didn't wish to honor the agreement and searched for a way to get out of it. And the way it got out of it is saying the unions don't agree, and therefore it's unenforceable.

MR. CROLEY: What we are trying to do is enforce the Collective Bargaining Agreement which is the governing document, and MCA is trying to come up with

a theory showing Scott Strawbridge has drafted [p. 21] the letter. He made the mistake in not having the letter signed it in writing.

He did not believe that the 1/7/94 letter modified the Collective Bargaining Agreement. That was a mistake on his part. If he wanted to submit to the unions, he could have. He chose not to. He chose to disregard the plain language in the Collective Bargaining Agreement.

It's also an undisputed fact that the Collective Bargaining Agreement must be in a duly authorized writing by all of the parties. That never happened here. It never happened.

Scott Strawbridge of MCA is the person who wrote the letter and did not comply with that fundamental condition in the Collective Bargaining Agreement, and we are simply trying to enforce that provision.

It is MCA who has come up with some kind of theory to get around that Collective Bargaining Agreement. They said the union orally waived that. That's their position. You can't do that. You can't come up with that theory.

THE COURT: If I rule in your favor, then these associations are right back where they were, right? They are going to be feuding about the same [p. 22] problem that brought them to write this letter to one another if [sic] the first place.

MR. CROLEY: You are absolutely correct, Your Honor. And if there is a continuing dispute, the proper resolution is you go to the collective bargaining table and negotiate a change, and that's exactly what MCA did with the union.

Scott Strawbridge sat down and worked out a switching proceedure [sic] and expressly incorporated it into the Collective Bargaining Agreement, and he believed, with the advice of counsel, that that was the only way that he could accomplish that change. That's the way it needs to be handled.

It can't be handled through some oral modification of the unions. What would happen, Your Honor, if three years from now there were different people in charge of the unions and they repudiated their oral waiver of what would happen, then would the associations be in the same position? I respectfully urge that the Court, by granting our position, would simply be telling the parties: Go back and do it the right way.

Go back and follow the Collective Bargaining Agreement, negotiate with the unions, enter into a writing. That's what you agreed to. [p. 23] That's been your history.

They can't point to a single modification Collective Bargaining Agreement that has been done in the way that the 1/7/94 letter was accomplished, not a single agreement.

Every other modification in Collective Bargaining Agreement has been in writing signed by the unions and by the employer associations.

THE COURT: All right. Do you have anything further that you want to say at this point?

MR. CROLEY: Well, the only other thing we would like to raise is again to emphasize that we did terminate this agreement in May of 1996.

Now that doesn't resolve the issue of these two contractors whether or not there may or may not be damages flowing from that. But we have terminated the agreement of May of 1996, and we would like the Court to rule that the agreement was validly terminated in 1996, and the reason we had the right to terminate it is that the agreement itself is indefinite.

It doesn't specify an ending date, and it's very clear under California law that, where a contract is under definite termination, that it's terminable, and GBA properly exercised the right to [p. 24] terminate that agreement.

THE COURT: Why would you need a right to terminate it?

MR. CROLEY: It's sort of an alternative position that we have taken. It certainly is our position that it's invalid from its inception. But as an alternative, we have also taken the position.

THE COURT: So you want me to rule that even if it was valid, it's no longer valid.

MR. CROLEY: Yes, yes. Of course we urge you to rule that. As you say, it was invalid from its inception. But in the event that you find it was valid, then we urge you to find that we properly terminated it in May of 1996.

THE COURT: Do you want to address that?

MR. CARTER: I would like to address about two or three points that he made.

One, he talked about the modification of a Local 38 agreement by written agreement was true because, in the

Local 38 agreement, it said if a contractor wants to transfer from one association to another, it can only be done with the written consent of the union on certain dates, etc. There you can go get the written consent. Local 38 insisted it wanted to do that.

[p. 25] He mentions that all the other modifications are in writing signed by all parties. That's true. But the unions had wanted to be party to every other amendment. If you formally amend to change wages or extension of the termination date or remodify fringe benefits, you do a memorandum, all parties sign.

The only reason that these agreements were not signed by the unions was because the union had stated to all parties in advance, "We don't want to be involved. We don't need to be involved. Whatever you guys agree is okay with us."

He is saying the union cannot do that, that they must sign even if the union says we don't want to sign. I submit to you when you read the cases, there is no federal case that says that. There is no compelling reason for it. There is no reason why union officials should be forced to take the time, even though it's only one minute, to read a document and sign it if the union officials say we don't care.

Basically, they are saying nothing that affects our members is being affected. What's being affected by this is who is handling arbitrations and grievance and who gets the money; and we, the union, [p. 26] want that to be done by the association that the contractor selected. We, the union, don't want to be involved in it.

So I submit to you there is no policy reason to insist that a union sign a document, and the union says, "We don't want to sign it. It's up to you."

As to the termination issue, it's brief somewhat in the summary adjudication motion, but basically, as the Court is well aware, the California law is that if there is a contract for an indefinite term, it can be terminated after a reasonable period of time.

Here, what is a reasonable period of time, I submit, isn't even involved in this case. These two contractors whose terminations of one agreement or transfer or assignment or however you characterize it, were before this purported letter of termination.

Therefore, whether there is a termination, it isn't necessary to adjudicate that issue. I submit that they are seeking, basically, a declaratory and advisory opinion, if you will, concerning theoretical rates to terminate an agreement that they contend is not an agreement in [p. 27] the first place. And I simply submit this Court need not even reach that issue.

MR. CROLEY: With regard to the advisory opinion arguments, we have cited cases that state that as long as a party has an interest in issue, that is not an advisory opinion. And here we certainly have an interest; there are contractors who may attempt to switch pursuant to this agreement, and we have an interest in knowing whether it's been properly terminated, and we decide cases on that point.

I would like to address the more fundamental issue dealing with whether or not there are more important

public policies for the Court not to disregard provisions in contracts that prohibit oral modifications.

I think there is no question we have addressed in our brief that oral modifications and implied modifications are of a class that are most likely subject to be abused. They boil down to "He said," "She said," and parties to contracts have a right to prohibit those kinds of modifications.

The California legislature has already found that parties have that right, and they put that into the Civil Code. So in a sense, they have [p. 28] already done the job for the Court because they have balanced those computing interests.

Additionally, every state in the United States that has adopted the Uniform Commercial Code rule, as applied to goods, which also strictly enforces no oral modification provisions.

In addition, I would like to raise one other point. MCA, for the first time, raises an estoppel-based argument in its opposition to our Motion in Limine, and we would like to state on the record an objection to that claim because estoppel is not asserted in their complaint affirmatively, and it must be specifically pled. So we would just like to state an objection to that.

Additionally, there are three sources of evidence before the Court dealing with the unions' waiver, and they are as follows:

First of all, the two declarations of the union business agents. When the Court reviews those declarations, you will see they do not meet the minimum standards of

showing personal knowledge and authority to state the unions' policy concerning contractors moving from one association to the another.

They state nothing more than conclusory [p. 29] opinions. They don't state how the unions' policy was formed. They don't state when the policy was formed. They don't state whether the union business agents even have the authority to create this policy.

It's not contained in those declarations, so I submit to you that when you review those declarations, there is no competent evidence that the unions waived at all.

Additionally, when you review Mr. Strawbridge's declaration, which is the third source of evidence submitted by MCA, that declaration on that point consists of nothing more than hearsay because it is Scott Strawbridge saying that the unions told me 'X.' Clearly hearsay.

The unions are not parties to this case. It's been MCA's own fault that they did not bring the unions into this case. They had the option to do that. They didn't, and that's the reason that the unions cannot be here for you and give their position on it.

MR. CARTER: I would like to address those briefly. First of all, as to the state law of arguments, as the Court will quickly learn, if you haven't had a chance to read those cases, this is [p. 30] governed entirely by federal law.

The Court has jurisdiction of Section 301, but you must apply federal law so the law concerning oral modification is federal law and that is crystal clear. And

which federal law you should apply is subject to briefs. I will go into it.

On the estoppel point, let me make two points: One, if the Court feels it necessary to make a motion to conform the pleadings to the proof and to add estoppel.

The second here, I think estoppel only came up when they came up with their 5th tiered defense; namely, it can't – the contract can't be enforced because it's not in writing, and the estoppel aspect that comes up then is GBA could have said back in June of 1994. This is a modification of the Collective Bargaining Agreement. Let's have the union sign it. GBA didn't say let's have the union sign it. There is no question. The unions would have signed it.

The unions were saying: Whatever you guys agree is fine with us. If any party had taken that agreement to the union and said "sign," they would have signed. They didn't because no one went to them. Why didn't they? Because the unions said: [p. 31] Whatever you do is fine with us. We don't care. You do it.

I do think there is a basis for an estoppel for GBA and not seek union concurrence in writing and now say sorry, after we have obtained the benefits that we wanted, you guys don't get the benefit because nobody bothered to take it to the union.

This was not Scott Strawbridge decision to go to the union. GBA could have gone to the union. They are the ones now taking advantage of that.

As to the union official's declarations, I believe those declarations make it clear that the unions had told officers of both associations that their policy was whatever the associations wanted was okay.

If the Court feels that we need evidence as to whether those business managers to the unions had that authority etc., let's set a hearing on that issue. But I don't think you will need that. That may be something that you feel you need additional proof on. We can get it.

MR. CROLEY: Your Honor, with regard to the estoppel issue and his statement to the Court to conform the pleadings to the evidence again, I would object to that.

[p. 32] It's very clear the estoppel has to be specifically plead in the complaint. It was not and therefore he cannot raise that argument.

Additionally, I am quite miffed at his argument that essentially GBA's inaction by not requesting that the unions somehow sign this agreement can constitute a reputation in the context of an estoppel claim.

If you ask Mr. Strawbridge why he didn't have the unions sign the 1/7/94 letter, he will tell you that the reason he didn't do it is because he did not review the 1/7/94 letter as a modification of the Collective Bargaining Agreement. So the estoppel fails at every turn.

THE COURT: All right. I'll take the matter under submission. If I need further briefing on any point or further arguments, I will let you know.

MR. CROLEY: May I raise one more point? Because Mr. Carter stated that it's state law, specifically the Civil Code section as I cited to you cannot apply.

We have cited case law to you saying that you can apply state law or contractual or general principles of contract law insofar as they are not [p. 33] inconsistent with the federal law, and I would urge you to review Mr. Carter's own opinion letter on April 16th, 1993, which I believe is attached in connection with our Motion for Summary Judgment.

In that letter, it says,

> "In this field, federal law governs GBA, but the law would look to California law which provides quite clearly a contract in writing may be modified by a contract in writing."

And he cites Civil Code 1698, and I believe we said 1698C. So again it's just another inconsistent position taken by MCA in this matter.

THE COURT: Thank you.

MR. CROLEY: Thank you, Your Honor.

MR. CARTER: Thank you.

(Proceedings were adjourned.)

IN THE SUPERIOR AND MUNICIPAL COURTS
OF THE STATE OF CALIFORNIA

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA PLAINTIFF, vs. GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS DEFENDANT.	CASE NO. 394184

STATE OF CALIFORNIA)
COUNTY OF SAN MATEO)

I, STACY VAN AKEN, A CERTIFIED SHORTHAND REPORTER AND PRO TEM REPORTER OF THE STATE OF CALIFORNIA, COUNTY OF SAN MATEO, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 33, COMPRISE A TRUE, ACCURATE AND CORRECT COMPUTER-AIDED TRANSCRIPTION OF THE PROCEEDINGS THAT I REPORTED IN DEPARTMENT 10 ON MARCH 18, 1997, IN THE MATTER OF THE ABOVE-ENTITLED CAUSE.

DATED THIS 25th DAY OF JUNE, 1997.

/s/ Stacy A. Van Aken
STACY A. VAN AKEN,
CSR 10969
PRO TEM REPORTER,
SUPERIOR COURT

Supreme Court, U.S.
FILED
APR 15 1999
CLERK

No. 98-1486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GREATER BAY AREA ASSOCIATION OF PLUMBING AND MECHANICAL CONTRACTORS,

Petitioner,

v.

MECHANICAL CONTRACTORS ASSOCIATION OF NORTHERN CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Five

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

I. THIS IS NOT AN APPROPRIATE CASE FOR THIS COURT TO RESOLVE CONFLICTS ON ORAL MODIFICATIONS OF COLLECTIVE BARGAINING AGREEMENTS.

The Petition is correct that there is a division of authority between the federal circuits concerning oral modifications of collective bargaining agreements. However, this is not an issue of significance in the federal courts, as implicitly admitted in the Petition where it is described as a "rare . . . opportunity to review this important area of law." (Petition, pages 6-7). Contrary to the Petition, this Court should devote its resources to resolving issues which occur frequently, or which are currently the source of division between federal circuits on significant issues. This Court need not reach out for the "rare" opportunity to resolve an issue.

Petitioner argues that the federal Courts of Appeal have proven incapable of achieving consistency on this area of the law. In fact the Courts of Appeal of at least three federal circuits have been able to achieve consistency on the basis of the ruling and reasoning of the Ninth Circuit in *Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996*, 597 F.2d 1269 (9th Cir. 1979) ("Hawaii Teamsters"). That decision has been cited with approval and followed in *Merk v. Jewel Food Stores*, 945 F.2d 889, 895 (7th Cir. 1991); *Eastern Air Lines v. Air Line Pilots Ass'n*, 861 F.2d 1546, 1555 (11th Cir. 1988); *N.L.R.B. v. Deauville Hotel*, 751 F.2d 1562, 1569, fn. 10 (11th Cir. 1985); *Local 1316, I. Bro. of E.W. v. Superior C. & A.*, 608 F. Supp. 1246, 1250 (N.D. Ga. 1985) .

The only court which has refused to follow the majority rule of *Hawaii Teamsters* is a divided panel of the Court of Appeal for the District of Columbia Circuit in *Martinsville Nylon Employees v. N.L.R.B.*, 969 F.2d 1263 (D.C. Cir. 1992). As noted in the decision of the Court below (App. 11, *et seq.*), all other Courts of Appeal have essentially followed the dictates of the United States Supreme Court and interpreted a collective bargaining agreement as an industrial charter permitting flexibility in administration and permitting case-by-case adjudication of proposed modifications or amendments. It is

only the D.C. Circuit in one panel opinion which has achieved an inconsistent result. The fact that this issue has minimal significance to lower courts is illustrated by the fact that the D.C. Circuit's opinion and holding that CBAs must be rigidly interpreted and oral modifications prohibited has **not been cited by a single other Circuit**, either with approval or disapproval. *Martinsville* was decided in 1992, and the Court below was the first case to review its holding. The issue hardly requires resolution by this Court.

The current division between the federal Courts of Appeal may be resolved by the D.C. Circuit revisiting the majority holding in *Martinsville*. It is entirely possible that, at that time, the D.C. Circuit will adopt holdings in accord with the prevailing view in the Seventh, Ninth, and Eleventh Circuits and will follow the reasoning of the dissenting opinion of Judge Wald in *Martinsville* and the California Court in this case.

This Court may, in the future, find it appropriate to resolve the conflict between the D.C. Circuit and the various other federal circuits which have followed the *Hawaii Teamsters* rule **if** another federal circuit decides to follow *Martinsville*, or if a state court of last resort elects to follow *Martinsville* when the federal circuit for that state has elected to follow *Hawaii Teamsters*. In those situations potential conflict and incentive to forum shopping would arise. At this time the controlling decisions, even though in conflict, do not encourage forum shopping, and there is no reason for this Court to devote its scarce resources to resolving a dispute which is not causing problems in the lower courts.

It also seems probable that those federal circuits which have not yet addressed the issue will elect to follow the reasoning of *Hawaii Teamsters* and the dissent of Judge Wald in *Martinsville*. The California court, applying its independent judgment as to which line of authority should control, found the reasoning of *Hawaii Teamsters* more consistent with federal labor policy (App. 13). It is submitted that this Court, if called upon to address the issue, will reach the same conclusion. However, it would be premature for this Court to address that issue at this time, rather than awaiting future appellate decisions which may eliminate the conflict.

As noted by the Court below (App. 13, *et seq.)*, the goal of the federal labor laws is to achieve "industrial peace." *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967). The decision of the Court below also cited with approval Judge Wald's dissent in *Martinsville*, which in turn relied on Justice Goldberg's concurring opinion in *Humphrey v. Moore*, 375 U.S. 335 (1964), in which Justice Goldberg wrote:

> There are too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties.

Id. at page 353-354.

The flexible view of collective bargaining agreements, adopted by the Ninth Circuit and the Court below, is also consistent with this Court's decision in *John Wylie & Sons v. Livingston*, 376 U.S. 543 at 550 (1963), where the Court stated: "[A] collective bargaining agreement is not an ordinary contract." In opposition to that holding of this Court, the D.C. Circuit in *Martinsville* purported to apply ordinary contract principles, and more specifically the UCC principles, even though such rigid analysis is inconsistent with numerous decisions of this Court. In fact, the rationale of the majority in *Martinsville* also implicitly disregards this Court's earlier holding that:

> [A] collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts.

[*Consol. Rail Corp. v. Railway Labor Executives*, 491 U.S. 299, 311 (1989), internal quotation marks omitted.]

II. THIS IS NOT AN APPROPRIATE CASE FOR THE COURT TO REVIEW THE ROLE OF SECTION 8(d) OF THE NLRA IN CONTRACT ACTIONS.

The Petition, on Issue No. 2, clearly fails to meet the requirements of Rule 10 of this Court. The Petition fails to demonstrate any conflict

between courts, or any conflict between the decision of the Court below and controlling federal law. This request is utterly frivolous.

The court below carefully analyzed this issue and concluded that, applying controlling federal law, the purported 8(d) defense could not be asserted in this contract action (App. 20, *et seq.*). As the Court noted, a violation of the provisions of § 8(d), if established, would constitute an unfair labor practice. The Court below followed the decision of the Seventh Circuit in *N.L.R.B. v. Local 554*, 991 F.2d 1302 (7th Cir. 1993), in holding that a midterm modification, and particularly one between two employer associations, is not covered by the notice requirements of § 8(d). On the basis of that controlling authority, the Court below noted: ". . . it is not at all clear that MCA committed an unfair labor practice in this case." (App. 23) The court went on to hold that the NLRB has exclusive jurisdiction to adjudicate disputes involving alleged unfair labor practices, relying upon this Court's decision in *Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 83 (App. 23).

The Petition at page 16 argues that the decision below would encourage "forum shopping" because "otherwise valid NLRA violations" could not be raised in Court. The flaw in GBA's reasoning is the assumption that both parties would have to agree to initiate Board proceedings. That is manifestly incorrect. Under the ruling of the Court below, and consistent with this Court's repeated rulings regarding "primary jurisdiction," either party would have the opportunity to file charges before the Board and thus to obtain a ruling on the NLRA violations from the entity possessing that expertise. Alleged NLRA violations should be brought before the Board, the entity designated by Congress for that purpose and the entity which has the expertise on those issues. GBA's position essentially seeks to involve both state and federal courts in matters within the exclusive jurisdiction of the Board.

GBA's inversion of priorities and logic is carried forward on page 17 where, in footnote 13, GBA makes the absurdist argument that MCA should be penalized because GBA failed to file a charge with the Board. GBA's footnote fails to explain why it should be rewarded for failing to file a ULP asserting that MCA had violated Section 8(d) of the Act.

As the court below noted (App. 20): "The unstated implication is that MCA's alleged violation of Section 8(d) is an unfair labor practice under the NLRA." Under those circumstances, GBA could have asserted its 8(d) defense by filing a ULP. Having failed to exercise its right to file a ULP and obtain a Board determination, GBA is now in no position to argue that federal or state courts should waste valuable judicial resources by rewarding parties such as GBA for sitting on their rights.

The court below (App. 24, *et seq.*) also answered GBA's argument that this case is an appropriate vehicle to analyze offensive versus defensive use of the NLRA (Petition, page 15). Prior decisions of this Court have made clear that the courts cannot be called upon to enforce contract provisions which are themselves illegal under substantive provisions of the NLRA, such as Section 8(e). On the other hand, it is the exclusive province of the Board, not the courts, to enforce the procedural provisions of the NLRA, as distinguished from the substantive provisions. *See* analysis of controlling authorities at App. 23-24.

CONCLUSION

For all of the foregoing reasons the Petition should be denied.

Respectfully submitted,

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